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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 DONALD ROTH,  
4 315 N. Righland Avenue  
Nyack, NY 10960,

5 Petitioner,

6 v.

09 Civ. 8712 (GBD) (IMS)

7 HEARING

8 UNITED STATES OF AMERICA,

9 Respondent.

10  
11 United States Courthouse  
12 White Plains, N.Y.  
13 May 9, 2013  
14 10:30 a.m.

15 Before:

16 THE HONORABLE LISA MARGARET SMITH,

17 Magistrate Judge

18  
19 APPEARANCES

20 CULLETON, MARINACCIO & FOGLIA  
21 Attorneys for Petitioner  
22 MICHAEL ANTHONY MARINACCIO

23 PREET BHARARA  
24 United States Attorney for the  
Southern District of New York  
25 BENJAMIN ALLEE  
Assistant United States Attorney

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1                   THE DEPUTY CLERK: In the matter of Roth v. the United  
2 States of America.

3                   Counsel, please note your appearances for the record.

4                   MR. ALLEE: Good morning, your Honor. Benjamin Allee  
5 for the government.

6                   THE COURT: Good morning, Mr. Allee.

7                   MR. MARINACCIO: Good morning, your Honor. And for  
8 the Petitioner, Mr. Roth, Michael Marinaccio.

9                   THE COURT: Good morning, Mr. Marinaccio.

10                  MR. MARINACCIO: Good morning.

11                  THE COURT: We are here for an evidentiary hearing on  
12 Mr. Roth's petition submitted before this Court.

13                  Mr. Marinaccio was appointed by the Court for purposes  
14 of representing Mr. Roth on what I believe to be a narrow issue  
15 regarding allegations of Charles Melvin having potentially or  
16 allegedly been promised certain benefits in connection with his  
17 trial testimony which were not revealed to the defense at the  
18 time.

19                  I believe we have several witnesses available should  
20 you wish to call them, Mr. Marinaccio.

21                  Do you want to make a preliminary statement of any  
22 sort?

23                  MR. MARINACCIO: Yes, your Honor.

24                  There are three witnesses before the Court -- or  
25 waiting outside today that I anticipate calling on behalf of

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1 Mr. Roth; Special Agent Boss -- I think he's now a lieutenant  
2 in the Newburgh Police Department -- Mr. Donald Campbell, and  
3 also former AUSA, Mr. Colton, who tried the case.

4 The Court had indicated previously, at our conference  
5 I believe on March 5th, that the issue of Judge Seibel's  
6 subpoena would be held in abeyance pending what the Court hears  
7 today.

8 Your Honor, as far as the narrow issues that we look  
9 to go into, we are, of course, focusing in on the \$5,000  
10 payment that I do not believe there will be any dispute was  
11 actually paid to Mr. Melvin. I think the issue comes down to  
12 when the discussions regarding that \$5,000 payment were first  
13 entered into, whether the trial was still ongoing, and whether  
14 or not the payment to Mr. Melvin should have been disclosed to  
15 the defense even at a date after he had testified, but before  
16 the trial had concluded.

17 It is going to be our argument in addition, your  
18 Honor, that, having failed to advise the defense of this  
19 additional payment or that this additional payment was in the  
20 works while the trial was still going on deprived Mr. Roth's  
21 counsel of an opportunity to recall witnesses on this issue to  
22 determine whether or not -- what the circumstances surrounding  
23 that payment were.

24 Also, your Honor, having reviewed now the transcript  
25 of the trial, including the examination and particularly the

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1 examination of Mr. Boss and Mr. Melvin and the summations that  
2 the government made at the conclusion of the case, the jury was  
3 left with the impression that the only benefit that Mr. Melvin  
4 could expect to receive was the 5K letter that's outlined in  
5 his cooperation agreement when, in fact, if the paperwork is to  
6 be believed on its face, discussions with Mr. Melvin had  
7 occurred as early as perhaps January 26th, maybe even earlier  
8 than that, and certainly as of February 1st, 2004, when  
9 Mr. Melvin signed an application for public voucher for reward,  
10 and it is our position, your Honor, that that information  
11 should have been disclosed to the defense and, had it been  
12 disclosed to the defense, there was ample time for an  
13 application to be made to recall witnesses on this issue, and  
14 failing to do that, it is our belief and our position that left  
15 a misimpression with the jury that ultimately rendered its  
16 verdict.

17 The problem is exacerbated, it seems to me, because  
18 now Mr. Melvin is essentially unavailable to the Petitioner on  
19 the basis of conversations that I had with his lawyer.

20 Is it Vita or D'Avita? I always confuse them.

21 THE COURT: James D'Avita?

22 MR. MARINACCIO: D'Avita. I apologize.

23 MR. ALLEE: Well, your Honor, in this instance, it's  
24 Joe Vita.

25 THE COURT: Oh, Joe Vita. Two different ones.

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1 MR. MARINACCIO: Oh, it's Joe Vita.

2 THE COURT: Two different ones.

3 MR. MARINACCIO: That's why I always confuse the two,  
4 Judge.

5 Mr. Vita, who is, unfortunately, not available and,  
6 therefore, unable to speak for himself because he's on an ocean  
7 liner somewhere on a cruise for vacation, but prior to him  
8 leaving, he advised me in no uncertain terms that his client,  
9 on his advice -- given his pending charges pending within the  
10 Southern District, his client, on his advice, would invoke his  
11 Fifth Amendment privilege against self-incrimination, a  
12 privilege that we submit would not have been an issue back in  
13 2003, 2004 had this information been promptly disclosed.

14 I have had some discussions, your Honor, with the  
15 government regarding the scope of the privilege, and it was my  
16 intention, if Mr. Melvin were to take the witness stand, not to  
17 ask him any questions about any of his prior bad acts, not ask  
18 him any question about his pending charges. The Court made it  
19 very clear the last time we were here, it seems to me, that the  
20 Court has available to it the full trial transcript, can read  
21 all about Mr. Melvin and his prior bad acts, and, therefore, I  
22 have taken the position that the invocation of the Fifth  
23 Amendment privilege is not required here because, number one,  
24 Mr. Melvin was not asked any questions about this \$5,000  
25 payment at the trial. He wasn't even asked any questions about

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1 subsistence payments for which the defense got notice. So,  
2 therefore, there is no possibility -- even if you get around  
3 the statute of limitations, there's no possibility that there  
4 would be any exposure for him.

5 But regardless of my explanation of that to Mr. Vita,  
6 he indicated that it is his position that his client would  
7 invoke the Fifth. I expect, your Honor, that his position  
8 would not change given the fact that, more recently,  
9 apparently, the government has superseded their indictment  
10 against Mr. Melvin to add additional charges. And I believe  
11 Judge Karas has set a second trial date for July 8th. So he  
12 has a trial date right now for May 20th, meaning Mr. Melvin,  
13 before Judge Karas, and I believe a second trial date for July  
14 8th. How that works out, I don't know. I'm not involved in  
15 that at all. But I expect that Mr. Vita's position would not  
16 be changed in view of those changed developments.

17 That is my preliminary statement.

18 THE COURT: Okay. Thank you, Mr. Marinaccio.

19 Mr. Allee, do you wish to make any introductory  
20 remarks?

21 MR. ALLEE: Well, your Honor, yes. I would like to  
22 just address what Mr. Marinaccio said.

23 I disagree with how he's characterized this hearing.  
24 As the Court has described, this is a narrow hearing. The  
25 issue centers on this payment of \$5,000 to Charles Melvin which

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1 was made to him about slightly less than two months after he  
2 testified in the trial of Donald Roth. We're here because  
3 Donald Roth challenges his conviction at trial on the ground  
4 that allegedly the government suppressed favorable evidence to  
5 him, impeachment material, and that the alleged suppression of  
6 that impeachment material was material, would put the case in a  
7 different light so as to undermine confidence in the verdict.

8 The factual disputes are the reason we're having this  
9 hearing, and your Honor, as I understand it, has ordered it in  
10 order to resolve the factual dispute about the timing of the  
11 payment and sort of who knew what when among law enforcement  
12 and among Charles Melvin. That does not mean that the scope of  
13 the hearing would include things like the summations of the  
14 parties or inquiry into those types of things.

15 I am elaborating on this concern I have because I've  
16 been handed just moments before you walked out what are marked  
17 as 17 exhibits that are potential exhibits for Mr. Roth. Many  
18 of them appear to be just excerpts of transcripts from the  
19 trial back in '03 and '04. And I've had an opportunity to read  
20 the first two of those trial excerpts. They include, however,  
21 additionally, the Attorney General's guidelines regarding the  
22 use of confidential informants, which is marked as an exhibit,  
23 a possible exhibit, and then a memorandum from 2010 about  
24 guidance for prosecutors regarding criminal discovery. It's  
25 hard for me to imagine how this hearing could have a scope that

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1 those would be relevant exhibits here, and I'm concerned about  
2 that.

3 Somewhat relatedly, I have a point to make about the  
4 procedure we're using here, your Honor. It is the plaintiff's  
5 burden of proof in a habeus --

6 THE COURT: Petitioner's burden. Petitioner's, not  
7 plaintiff's.

8 MR. ALLEE: Pardon me, your Honor. Petitioner's.  
9 I've gotten that all backwards. I tried to sit at the wrong  
10 table this morning.

11 It is the Petitioner's, Mr. Roth's, burden of proof  
12 here, as we all know. That came up at a conference, the most  
13 recent conference here, and your Honor ordered -- as I  
14 understand it, your Honor ordered the government to call  
15 witnesses notwithstanding that that's the evidentiary burden,  
16 and so we prepared -- pursuant to that order, we prepared that  
17 way. And I'm prepared to call Special Agent Boss and former  
18 AUSA Glenn Colton, who are outside this courtroom. They  
19 appeared -- well, firstly, I asked them to appear, and they  
20 did. I also understand that they have also received subpoenas  
21 from the Petitioner.

22 Mr. Marinaccio tells me he would like to call those  
23 witnesses. I don't really have a strong view about that, your  
24 Honor. I just want to point out that, to prepare today, I  
25 never got any of these documents that may be shown to these

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1       witnesses that may be relevant or not, and they have been  
2       prepared to be directed by the government pursuant to what I  
3       understood the Court to order. Again, however the Court wants  
4       to proceed is fine with me, but that's how we prepared for  
5       today, and that didn't include -- that was without the benefit  
6       of these exhibits or Mr. Marinaccio's view that he wants to  
7       call them as witnesses.

8               THE COURT: Let me just say, with regard to the  
9       transcript of the proceeding below, having not given it any  
10       deep thought, my initial response is that the Court, in order  
11       to make any assessment of materiality, has to consider and be  
12       familiar with that trial transcript. And it is a part of the  
13       Court record with regard to the petition, so it is before the  
14       Court. But my view of that is that it goes to the question of  
15       materiality and whether there was anything withheld that the  
16       Court may determine would have been likely to have changed the  
17       verdict. In order to make that assessment, the Court has to be  
18       familiar with the transcript below. But the transcript is what  
19       the transcript is. It's not subject to argument or discussion  
20       about what happened at trial.

21               MR. ALLEE: And your Honor, maybe I can just put  
22       what -- I don't mean to be cryptic. I have a concern from the  
23       outset of this proceeding that it will be a fishing expedition,  
24       that subpoenas have gone out to all kinds of people, and that  
25       there will be efforts to broaden this beyond what is necessary

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1 based on what the Court has ordered.

2 The Court ordered us to put on witnesses. The Court  
3 described the narrow issue at the hearing. We did that. I now  
4 fear what -- I now am concerned what is actually going to  
5 happen is there's a bunch of testimony that these witnesses  
6 haven't thought about for nine years that they're going to be  
7 asked about from the Petitioner and that this will turn into  
8 this sort of fishing expedition with ambush hooks, you know,  
9 throughout that I have feared to begin with. This is not what  
10 I expected this hearing to be. If there are relevant  
11 questions, ask them. If the plaintiff wants to call the  
12 witnesses, that's all fine. But I am starting to see the  
13 beginnings of what I was concerned this hearing would become  
14 and anticipate a lot of objections to relevance if all these  
15 are being offered on sort of collateral or tangential detours  
16 by the Petitioner here.

17 THE COURT: Well, the first thing that I want to say  
18 is, because we're proceeding without a jury, I may be somewhat  
19 more amenable to broader questions, but, as I made clear  
20 previously, I don't care if Mr. Melvin was treated or handled  
21 differently from every other informant ever used by any  
22 government attorney. That's not an issue. I don't care. It's  
23 not an equal protection issue.

24 To the degree that there may be any questions with  
25 regard to whether he was handled in a way that's contrary to

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1 any government guidelines, there may be some relevance there,  
2 but that is really dependent on what the various government  
3 agents, either law enforcement agents or prosecutors, knew and  
4 when they knew it, and we can only find that out by asking  
5 them.

6 My intention is to focus on the issue of the payment,  
7 on the issue of discussions with Mr. Melvin or in Mr. Melvin's  
8 presence, and the process by which that payment was made. And  
9 I didn't hear anything different from that from Mr. Marinaccio.  
10 I thought that's actually what I heard from Mr. Marinaccio.

11 MR. MARINACCIO: Yes, Judge.

12 Just so that the record is clear -- and, you know,  
13 again, I am mindful of the fact that we're here without a jury,  
14 you know. I trust the Court to be able to filter the  
15 information that's coming. I mean, basically, the excerpts of  
16 the transcript, as the Court correctly points out, the  
17 transcript is the transcript. The excerpts relate to the  
18 cooperation agreement and the testimony regarding the  
19 cooperation agreement and the benefit that was presented to the  
20 jury as to -- withdrawn -- as to what Mr. Melvin could expect  
21 as far as a benefit as a result of his cooperation. We have  
22 that.

23 We have the guidelines, meaning the government  
24 guidelines deal with the obligations of the prosecution team  
25 vis-a-vis discovery and payments.

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1                   Also included in the exhibits are evidence of payments  
2 that were made, that were disclosed to the defense, in the form  
3 of what's referred to as ATF subsistence payments,  
4 approximately \$11,300 and change. That, in fact, was revealed  
5 to the defense for them to make the determination as to whether  
6 or not they wanted to use it or not in this particular case at  
7 the trial. It doesn't appear, from what I've read of the  
8 transcript, that it was utilized, but the option was provided  
9 for the defense attorneys to make that determination.

10                  When it comes to the \$5,000 payment, though, I don't  
11 think there's any dispute that it was never revealed to the  
12 defense. And part of the argument is that, you know, now that  
13 we have the voucher for reward, now that we have it, we can  
14 certainly make the argument and the Court can certainly  
15 consider that it was -- number one, we can ask about the  
16 circumstances of it, but, number two, that it was certainly  
17 discussed and paperwork generated in sufficient time for them  
18 to have made this revelation to the defense for their use as  
19 they saw fit.

20                  And this trial, your Honor, did not conclude with a  
21 verdict, if my memory serves me, until February 12th of 2004.  
22 On January 26th, 2004, which is the first date that we have on  
23 this voucher, this trial was still going. As a matter of fact,  
24 the defense was on the defense case at that point. And when  
25 Mr. Miller signed it on February 1st -- Mr. Melvin, rather,

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1 signed it on February 1st, the case was still -- there was  
2 still testimony being taken. And on February 9th, another date  
3 that we have here, I believe summations had commenced. The  
4 only thing that happened after, based upon the dates that are  
5 on this document, after the trial was concluded, was the  
6 payment actually being made. And I think that the Court can  
7 consider it and should consider that timing in deciding the  
8 petition.

9 I'm mindful, Judge, of the limitations that the Court  
10 placed upon us. I've said that in a very long-winded way. I'm  
11 mindful of the fact that we're focusing in on the \$5,000.

12 THE COURT: I do think we need to go ahead and move  
13 forward. I know that we had had a discussion about who should  
14 call witnesses. I will admit my own notes are not as thorough  
15 on this issue as I might have liked. I know that I had  
16 directed the government to produce witnesses.

17 If I told you, Mr. Allee, that I was going to have you  
18 go first, I've changed my mind. And I do think that the burden  
19 is on the Petitioner. To the degree that witnesses have been  
20 made available, we should go forward and hear what they have to  
21 say.

22 As previously noted by Mr. Marinaccio, I've withheld a  
23 decision with regard to whether to require Judge Seibel to  
24 testify. I believe I've told the parties that she's willing to  
25 appear to testify on the matter to the best of her ability,

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1 but, after consultation with Judge Daniels, who is the assigned  
2 District Judge in the matter, I'm going to hold off on making  
3 that decision until I determine whether there's any open  
4 factual issue which she would be able to shed light on.

5 So that having been said, do I understand, Mr. Allee,  
6 that we have Mr. Boss, Mr. Campbell and Mr. Colton available?

7 MR. ALLEE: They are outside the courtroom, your  
8 Honor, yes.

9 THE COURT: Very good. Thank you.

10 Mr. Marinaccio, who do you want to hear from?

11 MR. MARINACCIO: I want to hear from Mr. -- well,  
12 Agent Boss initially.

13 THE COURT: All right.

14 Mr. Plant, would you go get him.

15 MR. ALLEE: I can do that.

16 THE COURT: Thank you, Mr. Allee.

17 ANDREW BOSS,

18 called as a witness by the Defense,

19 having been duly sworn, testified as follows:

20 THE DEPUTY CLERK: Please have a seat and state your  
21 name for the record. State and spell your name for the record.

22 THE WITNESS: Andrew Boss. A-N-D-R-E-W. Last name  
23 B-O-S-S.

24 THE COURT: You may proceed, Mr. Marinaccio.

25 MR. MARINACCIO: Thank you, your Honor.

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Boss - Direct

1 DIRECT EXAMINATION

2 BY MR. MARINACCIO:

3 Q. Agent Boss, good morning.

4 A. Morning.

5 Q. How are you?

6 A. Great. How are you?

7 Q. We have never spoken before today, correct?

8 A. No. Just briefly in the hallway.

9 Q. Agent Boss, just tell us how you are currently employed.

10 A. Special agent with Bureau of Alcohol, Tobacco, Firearms and  
11 Explosives.

12 Q. And how long have you been so employed?

13 A. Since July of 1998.

14 Q. And you were involved, were you not, in the investigation  
15 and prosecution of Mr. Donald Roth and Mr. St. John, correct?

16 A. Yes.

17 Q. And in connection with that investigation and others, you  
18 had contact with an informant by the name of Charles Flip  
19 Melvin; is that correct?

20 A. Correct.

21 Q. Okay. Were you the handling agent for Mr. Melvin?

22 A. Yes.

23 Q. And what exactly does that entail, being the handling agent  
24 for Mr. Melvin?

25 A. You maintain contact, handle any paperwork related to the

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Boss - Direct

1 informant, money, generally wiring up if you're doing  
2 undercover-type deals, handling evidence.

3 Q. And in connection with your handling of Mr. Melvin, during  
4 the course of his cooperation, were subsistence payments made  
5 to him from the Alcohol, Tobacco and Firearms Bureau?

6 A. Yes.

7 Q. Do you recall approximately how much money in subsistence  
8 payments were made?

9 A. Subsistence itself, somewhere around -- well, depends on  
10 the time frame.

11 Q. Okay.

12 MR. MARINACCIO: May I have just a moment, your Honor?

13 THE COURT: Sure.

14 (Pause)

15 MR. MARINACCIO: Your Honor, I would like to show the  
16 witness what I have premarked as Petitioner's Exhibit 11. And  
17 I have a copy for the Court. I may have provided a marked-up  
18 copy to somebody. Or perhaps not.

19 A. There's writing on the bottom of this one. Is that your  
20 handwriting?

21 Q. No.

22 Is there any yellow markings on it?

23 A. No.

24 Q. If there's no yellow markings, then we're okay.

25 A. No.

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Boss - Direct

1 Q. Okay.

2 Do you recognize what has been marked as Petitioner's  
3 Exhibit 11?

4 A. Yes.

5 Q. What do you recognize it to be?

6 A. Want me to go page by page?

7 Q. Just focusing on the first two pages.

8 A. That is like a word document, like a summary sheet, for  
9 subsistence paid to Charles Melvin.

10 Q. And what period of time does it cover?

11 A. Looks like early '02, March '02, through October '03.

12 Q. Okay. And do you recall whether or not this document was  
13 provided to Mr. Roth's attorneys during the course of  
14 discovery?

15 A. I don't know if it was.

16 MR. ALLEE: Objection. Foundation.

17 THE COURT: Overruled.

18 Q. You don't recall?

19 A. I know this was -- I saw this during the trial, but I don't  
20 know who gave anything to who, no.21 MR. MARINACCIO: Your Honor, I offer it into evidence,  
22 Petitioner's Exhibit 11.

23 MR. ALLEE: No objection.

24 THE COURT: The entire thing?

25 MR. MARINACCIO: Yes, Judge, the entire thing.

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Boss - Direct

1                   THE COURT: Well, what I've heard is a description of  
2 the first two pages, so I think I need more of a description of  
3 the rest before I can receive it.

4                   MR. MARINACCIO: Very well, Judge.

5                   THE COURT: Let me inquire.

6                   Mr. Boss, do you know what the marking at the bottom  
7 right which starts with the numbers 3502, do you know what that  
8 means?

9                   THE WITNESS: It's just the 3500 material. I don't  
10 know who put it there.

11                  THE COURT: And 3500 material would have been produced  
12 by the government to defense counsel; is that right?

13                  THE WITNESS: That's usually the way it works, yes.

14                  THE COURT: Go ahead, Mr. Marinaccio. You can ask  
15 with regard to the pages beyond the first two.

16                  MR. MARINACCIO: Beyond the first two. Thank you,  
17 your Honor.

18 Q. Page three, what do you recognize that page to be, if at  
19 all?

20 A. I've seen these pages before. This is -- these forms are  
21 done by the U.S. Attorney's Office.

22 Q. Did you see this form, this particular form?

23 A. I can't particularly say I saw this particular form.

24 Q. Do you recognize that form? Have you seen that form in the  
25 past? Not this particular one, but a form similar to it.

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Boss - Direct

1 A. Yes.

2 Q. What's the purpose of that form, if you know?

3 A. It's for the victim witness coordinator of the courthouse,  
4 or Southern District U.S. Attorney's Office, to provide money  
5 to cooperating a witness victim.6 Q. And do you know if this particular form relates to Charles  
7 Melvin?

8 A. Reading it, yeah. It says it does.

9 Q. Okay. Moving on to the next page, which is redacted, the  
10 third page -- the next page after that, which is redacted, did  
11 you ever see those pages in connection with the third page of  
12 the document before?

13 A. Yes.

14 Q. Is it part of the third page which has the markings 3502-U,  
15 those two redacted pages?16 A. I don't know if they're part of the same form, but it's --  
17 it's part of the process, yeah.

18 Q. How about the part of the document that's marked as 3502-V?

19 A. This is the one I'm talking about that I saw before, yeah,  
20 V.

21 Q. You saw that one before as well?

22 A. Yes.

23 Q. Okay. And how about the next page after that that's marked  
24 3502-W?

25 A. Yes.

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Boss - Direct

1 Q. You saw that before?

2 A. Yes.

3 Q. And 3502-X?

4 A. Can't say that I remember this one.

5 Q. And what about the final page?

6 A. I have two more after that.

7 Q. You have two more after that?

8 A. I have a declination form that's not marked with any 3500,  
9 and then I have another copy of 3502-U.

10 Q. Is that a duplicate copy of the --

11 A. The first page? Probably. Yeah. I have two 3502-Us.

12 MR. MARINACCIO: Your Honor, I'll offer just the first  
13 two pages of this document into evidence.14 THE COURT: Okay. Just the first two pages. 3502-Z  
15 is how the first page is marked, and then the second one  
16 appears to be a continuation. Is that right?

17 MR. MARINACCIO: That's correct.

18 THE COURT: All right. So we're going to keep that as  
19 Plaintiff's 11-A. Sorry, not plaintiff, Petitioner. So I'm  
20 going to make that 11-A. And there being no objection from the  
21 government, 11-A is received.

22 (Petitioner's Exhibit 11-A received in evidence)

23 THE COURT: I don't mean to interrupt, Mr. Marinaccio,  
24 but, Mr. Boss, just for my edification, the two documents that  
25 are marked 3502-V and W, is that your signature on the bottom

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Boss - Direct

1 right on those two documents?

2 THE WITNESS: V, yes. W, yes.

3 THE COURT: Okay. Thanks.

4 Go ahead, Mr. Marinaccio.

5 MR. ALLEE: Your Honor, I'm sorry to interrupt, but I  
6 just want to maybe, for the record, clarify.

7 These are documents submitted also with the  
8 government's brief as Exhibit F, and so, while they're not  
9 properly offered through Agent Boss, we have no objection to  
10 authenticity or to the Court's consideration of them.

11 THE COURT: The remainder of 11?

12 MR. ALLEE: Yes, your Honor. I would have voir dire.  
13 This is not the right witness. But my point is --

14 THE COURT: If you're conceding that they're  
15 admissible, we'll just receive them. That's fine.

16 MR. ALLEE: We're happy for the Court to consider  
17 them. We're not disputing their authenticity. There are  
18 problems with asking Agent Boss about them.

19 THE COURT: All right. Well, let's consider the rest  
20 of the documents as Petitioner's 11-B. So 11-A Mr. Boss has  
21 been able to identify. 11-B I will receive, but it may be that  
22 inquiry will have to be through someone else, though he did  
23 identify that it's his signature on 3502-V and 3502-W.

24 Go ahead, Mr. Marinaccio.

25 MR. MARINACCIO: Thank you, your Honor.

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Boss - Direct

1 (Petitioner's Exhibit 11-B received in evidence)

2 Q. Now, Agent Boss, I'm sorry, the payments that are reflected  
3 on Petitioner's 11-A, the last payment appears to have been  
4 made on December 1st, 2003; is that correct?

5 A. I have October 1st.

6 Q. October 1st. I am sorry. You're correct. October 1st,  
7 2003.

8 A. Yes.

9 Q. Do you recall now whether that was before or after the  
10 trial of Mr. Donald Roth commenced?

11 A. I believe that was before.

12 Q. Now, other than the payments -- withdrawn.

13 Did you have any role to play in determining whether  
14 or not these payments that were made to Mr. Melvin, these  
15 subsistence payments that are reflected here that were made to  
16 Mr. Melvin, actually went for subsistence payments or were used  
17 for some other purpose by Mr. Melvin?

18 A. Like do I know exactly what he did with it?

19 Q. Correct.

20 A. Some of it, I know he paid his rent with, cell phone bill.

21 Q. Did you request any documentation from him to confirm that  
22 he was actually using these payments to pay for phone bills and  
23 rent and things of that nature?

24 MR. ALLEE: Objection. Relevance.

25 THE COURT: I'm going to allow it, but we're not going

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Boss - Direct

1 to go very deeply into this, Mr. Marinaccio.

2 MR. MARINACCIO: I'm not going to go very deeply into  
3 it.

4 THE COURT: You may answer the question, Mr. Boss.

5 A. No.

6 Q. And how did these payments come about? Did he just request  
7 them and then you paid them or did you volunteer to give them?  
8 How did he come about getting these payments? Do you know?

9 A. Both. It could have been needing money for rent, a phone  
10 bill was due, electrical. Could have requested. Could have  
11 paid for the -- gave him the money to put more minutes on his  
12 boost phone, something like that.

13 Q. And are you the person that he would ask for these payments  
14 from time to time?

15 A. Yes.

16 Q. And other than the documentation that is contained in  
17 Petitioner's Exhibit 11-A and Petitioner's Exhibit 11-B, are  
18 you aware of any other documentation that was generated in  
19 connection with these payments?

20 A. Yeah. All of these payments, they would have requests of  
21 the funds, return of the funds. We have the paperwork related  
22 to the other stuff. But it's a request receipt and return,  
23 basically. It's government forms.

24 THE COURT: When you say these payments, are you  
25 referring to the ones that are identified on the list in

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1 Petitioner's 11-A?

2 THE WITNESS: Yes.

3 THE COURT: Okay.

4 Q. Now, other than the payments that are reflected on  
5 Petitioner's 11-A, was Mr. Melvin provided with any other  
6 monies that you're aware of?

7 A. 11-A?

8 Q. Other than 11-A.

9 A. Yes.

10 Q. Okay. Was he also presented at some point with a \$5,000  
11 payment?

12 A. Yes.

13 MR. MARINACCIO: Your Honor, I would like to show the  
14 witness what I have marked as Petitioner's Exhibit 1. And I  
15 have a copy for the Court as well.16 Q. Agent Boss, have you had the opportunity to take a look at  
17 what has been marked as Petitioner's Exhibit 1?

18 A. Yes.

19 Q. Do you recognize that document?

20 A. Yes.

21 Q. What do you recognize that document to be?

22 A. Would you like me to go page by page? They're separate  
23 forms.

24 Q. Okay. How about the first page?

25 A. First page is Treasury Department application for public

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1 voucher for reward.

2 Q. What about the second page?

3 A. That, again, is under the Department of the Treasury. It's  
4 a request for the advance of funds. So that's requesting  
5 money.

6 Q. I want to make sure that we're looking at the same second  
7 page.

8 A. The top says request for advance of funds.

9 Q. Your second page is not justification for payment?

10 A. Oh, sorry. Second page. Sorry, yes. Justification for  
11 payment continued.

12 Q. So is the second page part of the first page?

13 A. Yes. Same form.

14 Q. All right. Now moving on to the third page of the  
15 document.

16 A. That's the request for advance of funds.

17 Q. Okay. And the fourth page?

18 A. This is the report of expenditure for the funds requested.

19 Q. And is the fourth page part of the third page or are they  
20 separate?

21 A. Separate.

22 Q. And how about the fourth page? The last page, rather? I'm  
23 sorry.

24 A. It's a receipt, payment receipt for investigative expense,  
25 information and/or Treasury check.

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1 Q. Now, have you seen these documents before?

2 A. Yes.

3 Q. And are these the documents that reflect a payment of  
4 \$5,000 to Mr. Melvin?

5 A. Yes.

6 MR. MARINACCIO: Your Honor, I offer the entirety of  
7 what I've marked as Petitioner's Exhibit 1 into evidence.

8 MR. ALLEE: No objection.

9 THE COURT: Petitioner's 1 is received. It's a  
10 five-page document.

11 (Petitioner's Exhibit 1 received in evidence)

12 Q. Now, Agent Boss, did you have a role to play in preparing  
13 the documents that are part of Petitioner's Exhibit 1?

14 A. Yes.

15 Q. And taking a look at the first section at the top of the  
16 first page, where it begins, "I, Charles Melvin," and you see  
17 there's a date a couple of lines down, 26th day of January,  
18 2004?

19 A. Yes.

20 Q. Okay. Did you type that date in or have that date typed  
21 in?

22 A. No.

23 Q. Okay. Do you know what significance that date has?

24 MR. ALLEE: Objection.

25 THE COURT: Overruled.

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Boss - Direct

1 A. No.

2 Q. Was the trial of Mr. Roth still ongoing on January 26th,  
3 2004, if you recollect?

4 MR. ALLEE: Objection. Relevance.

5 THE COURT: Overruled.

6 A. It was.

7 Q. And then below that paragraph, there is a typed-in name,  
8 Charles Melvin, a signature, and then a date, 2-1-04.

9 A. Yes.

10 Q. Is that Charles Melvin's signature?

11 A. Yes.

12 Q. And were you present when Charles Melvin signed that  
13 document on 2-1-04?

14 A. I -- I don't think so. I don't remember.

15 Q. Now, did you have discussions with Mr. Melvin regarding  
16 this \$5,000 payment?

17 A. Yes.

18 Q. Did he request the \$5,000 payment?

19 A. The specific amount?

20 Q. Yes.

21 A. I don't believe he requested a specific amount.

22 Q. Do you recall what the circumstances were surrounding the  
23 generation of this particular paperwork?

24 Do you understand my question?

25 A. No, not really.

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Boss - Direct

1 Q. How did it come about that you were preparing these  
2 documents or that these documents were being prepared?

3 A. The background?

4 Q. Yes.

5 A. I had talked to him on the phone. It was sometime early in  
6 the year. And we were talking about how he was either not  
7 allowed to live at his mother's anymore in Virginia or he got  
8 kicked out or something to that effect, and he was down on his  
9 luck, and he was asking for money.

10 Q. When you say sometime early in the year, are you talking  
11 about early in 2004?

12 A. Yes.

13 Q. While the trial of Mr. Roth was still ongoing?

14 A. Yes.

15 MR. ALLEE: Objection. I just object to questions  
16 about whether the trial was ongoing. I don't have to do it  
17 every time, your Honor, but --

18 THE COURT: You can have a continuing objection. I'm  
19 overruling it.

20 MR. ALLEE: Thank you, your Honor.

21 Q. Other than Petitioner's Exhibit 1, do you have any other --  
22 withdrawn.

23 Other than Petitioner's Exhibit 1, have you seen any  
24 other document relating to the payment of \$5,000 to Mr. Melvin?

25 A. The whole thing? No.

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Boss - Direct

1 Q. When Mr. Melvin called you sometime early in 2004, did you  
2 prepare any notes or documentation concerning that  
3 conversation?

4 A. No.

5 Q. No investigative reports? No handwritten notes? Nothing?

6 A. No.

7 Q. What was the next step that you took after Mr. Melvin  
8 called you to tell you he was down on his luck and he needed  
9 some money?

10 A. I got with my boss at the time -- he was an acting boss,  
11 John McKenna -- and asked him what we could do.

12 Q. And what did Agent McKenna tell you?

13 A. He told me part of what I already knew is we could not give  
14 him any more money if he wasn't working for us  
15 subsistence-wise. We couldn't just give him money for --  
16 because he needed it. He was done cooperating. But an option  
17 was we could give him a reward for all the prior work that he  
18 had done.

19 Q. Now --

20 THE COURT: I'm sorry, Mr. Marinaccio, I do think I  
21 need to interrupt you just briefly.

22 With regard to Petitioner's Exhibit 1, in accordance  
23 with my previous instructions to the government, they have  
24 produced to me the unredacted version of all five pages from  
25 Petitioner's Exhibit 1, and I'm satisfied that there's nothing

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1 in the redactions which would impact on Mr. Roth's ability to  
2 pursue this question and that there's no need for you to have  
3 the unredacted version.

4 MR. MARINACCIO: Fine, Judge.

5 And just to complete the record, I was provided with  
6 this copy that I've marked as Petitioner's 1 from the  
7 government following the Court's determination regarding the  
8 redaction.

9 Q. Now, in the body of the document -- going down in the body  
10 of the document, first page, after Charles Melvin's signature,  
11 there's an explanation regarding why this particular payment is  
12 justified; is that correct?

13 A. Yes.

14 Q. And there's no mention in that particular paragraph there  
15 concerning Mr. Melvin's need for any monies to pay for living  
16 expenses or things of that nature, correct?

17 A. No, correct.

18 Q. And I see that you took a look both at the first and the  
19 second page; is that correct?

20 A. Yes.

21 Q. So there's absolutely no record in this particular  
22 document, those first two pages, of any request by Mr. Melvin  
23 for help with living expenses?

24 A. Correct.

25 Q. The only thing that's mentioned there is the work that he

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1 did in connection as a confidential informant in connection  
2 with the prosecution or the investigation and prosecution of  
3 various individuals, correct?

4 A. Yes.

5 Q. And on the first page, it indicates that there are 11  
6 defendants that he helped with, correct?

7 A. Correct.

8 Q. Now, did those 11 include Mr. Roth and Mr. St. John?

9 A. I believe this paragraph is referring to the defendants  
10 prior to the initiation of the investigation with Mr. Roth and  
11 St. John.

12 Q. And the second page, the explanation there, that deals with  
13 Mr. St. John and Mr. Roth, correct?

14 A. Yes.

15 Q. And then if you look in that last paragraph, it now talks  
16 about 13 defendants to date, correct?

17 A. Correct.

18 Q. And it talks about, in the last line, the investigation of  
19 and conviction of the defendants were a direct result of his  
20 efforts, meaning Mr. Melvin's efforts, correct?

21 A. Correct.

22 Q. Mr. Roth and Mr. St. John had not yet been convicted,  
23 correct?

24 A. Right.

25 Q. Would the fact that now you're talking about 13 defendants

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Boss - Direct

1 in that last paragraph as opposed to the 11 that you talked  
2 about on the first page, would those additional two then  
3 include Mr. Roth and Mr. St. John?

4 A. I don't believe so.

5 Q. You don't believe so?

6 Do you know who the two additional defendants may have  
7 been?

8 A. There was plenty of defendants he had helped arrest. We  
9 didn't prosecute everybody on the federal end. Could have been  
10 two state defendants. Could be a typo.

11 Q. But you don't know as you sit here right now?

12 A. No.

13 Q. And that last paragraph talks about assistance to the ATF  
14 and the United States Attorney's Office, correct?

15 A. Yes.

16 Q. And that he provided testimony in Federal Court as needed,  
17 correct?

18 A. Yes.

19 Q. Doesn't mention anything about state court?

20 A. It does not, no.

21 Q. Okay. And the final line there is it's recommended that  
22 there be a reward to Mr. Melvin, correct?

23 A. Yes.

24 Q. Now, who prepared this write-up, this summary that's in the  
25 first two pages of the document?

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Boss - Direct

1 A. I did -- I'm not sure how I did, but I did the write-up and  
2 provided the substance of the paragraphs, but my acting  
3 supervisor prepared the form. I was on trial.

4 Q. You were in court every day on the Roth and St. John  
5 matter, correct?

6 A. Yeah. I don't believe we had laptops at that point,  
7 either, so it wasn't --

8 Q. It wasn't that long ago.

9 A. I worked for the government.

10 THE COURT: He works for the government.

11 A. No laptops nine years ago.

12 THE COURT: Unlikely.

13 Q. Well, I didn't have a laptop, either, then.

14 Anyway, my point is do you know when it was that you  
15 prepared the write-up that ultimately was transferred onto this  
16 form?

17 A. Not specifically, no.

18 Q. Now, on going back to the first page, on the bottom,  
19 there's a place for a signature on that first line. Is that  
20 your signature?

21 A. No.

22 Q. Whose signature is that?

23 A. I can't tell whose signature that is. Somebody signed it  
24 for me.

25 Q. Did they sign it for you with your permission?

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Boss - Direct

1 A. Yes.

2 Q. Do you know who it was that may have signed it for you?

3 A. I can't make it out, no.

4 Q. And that was done, as far as you know, on February 9th,  
5 2004?

6 A. That's what it says, yes.

7 Q. And you weren't able to sign that because you were in court  
8 on trial?9 A. The trial ended around this time, but I wasn't around to  
10 sign it, right.

11 Q. Now, who came up with the amount of \$5,000?

12 A. That -- I believe it was between myself and my boss, John  
13 McKenna, like how much could we reasonably give him as a reward  
14 considering the work that was done.15 Q. So it had nothing to do with what Mr. Melvin said he needed  
16 to help him out with his living expenses?

17 A. That was a consideration, yeah.

18 Q. Did he show you any bills or any backup for why he may have  
19 needed this money?

20 A. I don't remember if he did or didn't.

21 Q. And you wrote this up as a reward?

22 A. Yes.

23 Q. But your testimony is that Mr. Melvin had requested some  
24 assistance for living expenses?

25 A. Yes.

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Boss - Direct

1 Q. And this was a way for you to get around the fact that you  
2 would not be able to give him any money because he was no  
3 longer actively participating, correct?

4 MR. ALLEE: Objection.

5 THE COURT: Sustained. Rephrase it.

6 Q. Well, let's go to the third page.

7 Did you fill out those boxes that are on the third  
8 page of the where it says informant subsistence and then other  
9 with the parentheses explain? Did you check off those boxes?

10 A. I'm not sure if I did the top. I can't say for sure if I  
11 actually filled out the top part. I probably did, but I'm not  
12 sure.

13 Q. Now, there's a section, then, underneath that that calls  
14 for an explanation and justification, and, there, there is an  
15 explanation. And it makes no mention, does it, of any request  
16 by Mr. Melvin for subsistence assistance, correct?

17 A. Correct.

18 Q. The explanation deals solely with a reward?

19 A. Yes.

20 Q. And then there's a place on the bottom there for signature  
21 under the date February 20th, 2004. Is that your signature  
22 next to your name, Andrew M. Boss?

23 A. Yes.

24 Q. That is your signature?

25 A. Yes.

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Boss - Direct

1 Q. And there is a figure to the right of total funds expended  
2 in this case to date, \$2,582.72. What was that figure? What  
3 did that represent?

4 A. That was money expended on this case to date, to that date.

5 Q. Was that monies that were expended for Mr. Melvin or monies  
6 that were expended for routine investigative expenses?

7 A. Probably both.

8 Q. Is part of that \$2,582.72 reflected in what was marked as  
9 Petitioner's Exhibit 11-A?

10 A. Yeah. Should be. If any of this was subsistence. If this  
11 was the subsistence, yeah, it would be reflected here.

12 Q. You we can't tell just from looking at this document?

13 A. No, I cannot.

14 Q. So that additional money could have been an additional  
15 reward that was paid, correct --

16 MR. ALLEE: Objection.

17 Q. -- to Mr. Melvin?

18 THE COURT: Sustained.

19 Let me ask you, Mr. Boss, to look back at Petitioner's  
20 2-A. On the second page of 2-A -- sorry, 11-A, I'm sorry,  
21 11-A, on the second page of 11-A, under the date 10-24-02, it  
22 says \$3,000, relocation expense, correct?

23 A. Correct.

24 THE COURT: And so, quite clearly, the amount of money  
25 identified on the list that makes up Plaintiff's 11-A is not

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Boss - Direct

1 reflected in the \$2,582.72 on the third page of Petitioner's 1;  
2 is that right?

3 THE WITNESS: Um.

4 THE COURT: Couldn't be.

5 THE WITNESS: Well, right, couldn't be, but say -- I'm  
6 just saying, just for clarification, say in 10-1-03, if he --  
7 he may have been paid subsistence out of like a different case.  
8 But it probably isn't. Because now I remember correctly we  
9 didn't open this case until after this takedown. We had a big  
10 sweep in Newburgh, and that happened in end of October of '0 --  
11 it might have been '02.

12 THE COURT: So the subsistence payments that are  
13 identified on Petitioner's 11-A would not necessarily have come  
14 under this case number. It could have come under any of the  
15 other case numbers that, for example, are on the first page of  
16 Petitioner's 1, but which I've allowed to have redacted --

17 THE WITNESS: Yes.

18 THE COURT: -- with regard to other defendants that  
19 Mr. Melvin participated in the investigation and prosecution  
20 of.

21 THE WITNESS: Yes. There was approximately like five  
22 separate investigation numbers we used over -- when we were  
23 using Mr. Melvin.

24 THE COURT: So if, in fact, we had the various  
25 additional documents that you referenced earlier relating to

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Boss - Direct

1 the subsistence payments on Petitioner's 11-A, each of those  
2 payments would reflect separately which case number that  
3 subsistence was related to.

4 THE WITNESS: Correct.

5 THE COURT: Am I getting it?

6 THE WITNESS: Yes.

7 THE COURT: Okay.

8 I'm sorry, Mr. Marinaccio. Go ahead.

9 Q. Do you know when the \$5,000 payment was actually made to  
10 Mr. Melvin?

11 A. Yes.

12 Q. When was that?

13 A. February 21st, 2004.

14 MR. ALLEE: Your Honor, if the record could just  
15 reflect the witness appears to have refreshed his recollection  
16 with a document before he made the answer to the question.

17 Q. Which page of the document did you look at to get that  
18 date, sir?

19 A. Last page. It's on the bottom of --

20 Q. Date received, February 21st, 2004?

21 A. Yeah. It's also reflected on the bottom of the request to  
22 advance funds. When I return, if there's any money to return,  
23 it has the date on it. It's basically the date that's used.

24 Q. Now, you were part of this prosecution team, were you not,  
25 the prosecution team that was prosecuting Mr. Roth and Mr. St.

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1 John? Correct?

2 A. Yes.

3 Q. And you were in court with the U.S. Attorneys every day,  
4 correct?

5 A. Yes.

6 Q. And you indicated that, when you received the request from  
7 Mr. Melvin, was he residing in the New York area or was he down  
8 in Virginia at the time?

9 A. He was residing in Virginia.

10 Q. Okay. And according to Petitioner's Exhibit 11-A, the  
11 second page, the amount that the Judge pointed out dated  
12 10-24-02, relocation expense of \$3,000, was that to assist him  
13 to relocate down to Virginia?

14 A. Possibly some of it. He was initially relocated out of the  
15 City of Newburgh briefly, right before the takedown.

16 Q. Now, getting back to the payment of the \$5,000, you  
17 indicated that you had spoken to Agent McKenna about how you  
18 can go about doing this, and you came up with the reward  
19 scenario, correct?

20 A. Yes.

21 Q. And you were in court just about every day the court's in  
22 session on the Roth and St. John matter. Did you ever discuss  
23 this additional payment with either Mr. Colton or Ms. Seibel?

24 A. I may have. I don't know.

25 Q. And do you have any recollection of when you might have

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1 discussed it with -- well, let's break it down.

2 Do you recall ever discussing it with Mr. Colton?

3 A. I don't recall.

4 Q. How about with Ms. Seibel?

5 A. No.

6 Q. But you may have?

7 A. Yes.

8 Q. And if you had discussed it with one of them, is there one  
9 in particular that you would have discussed it with or doesn't  
10 matter?

11 MR. ALLEE: Objection.

12 THE COURT: Overruled.

13 A. No.

14 Q. Do you have any idea where that discussion might have taken  
15 place?

16 MR. ALLEE: Objection.

17 THE COURT: Sustained.

18 Q. Do you have any recollection of whether or not the trial  
19 was still going on?

20 MR. ALLEE: Objection.

21 THE COURT: Sustained.

22 Q. Is it your testimony, Agent Boss, that, to the extent the  
23 Petitioner's Exhibit number 1 reflects the payment of a reward  
24 as opposed to a request or the fulfillment of a request for  
25 subsistence, that that report is inaccurate?

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1 MR. ALLEE: Objection.

2 THE COURT: I'm not sure I understand the question,  
3 Mr. Marinaccio. Perhaps you can rephrase it.4 MR. MARINACCIO: I'm sorry to be repetitious, Judge.  
5 It's the only way I can rephrase it.6 Q. You've indicated that the request came sometime early in  
7 the year, to the best of your recollection, from Mr. Melvin  
8 that he needed some help.

9 A. Yes.

10 Q. He was falling on some hard times.

11 You discussed it with Agent McKenna. And the only way  
12 you came up with that you can get him that help was to prepare  
13 a document for a reward, correct?

14 A. Yes.

15 Q. And the document itself, with the exception of the one box  
16 that's checked off as subsistence, the descriptions all reflect  
17 a reward, correct?

18 A. Yes.

19 Q. Is it your testimony that, to the extent the document  
20 reflects the reward and not subsistence, that that document,  
21 Petitioner's Exhibit 1, is inaccurate?

22 MR. ALLEE: Objection.

23 THE COURT: Well, Mr. Boss, looking at the very last  
24 page of Petitioner's Exhibit 1, am I correct that, on that  
25 page, as well as on the third page, there's a box checked that

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Boss - Direct

1 says subsistence?

2 THE WITNESS: Correct.

3 THE COURT: All right.

4 Perhaps you can rephrase it, Mr. Marinaccio.

5 Q. Well, other than the two boxes that reflect subsistence,  
6 the descriptions themselves reflect only a reward, correct?

7 A. Yes.

8 Q. To the extent that the descriptions reflect only a reward,  
9 Petitioner's Exhibit 1 is inaccurate, correct?10 MR. ALLEE: I object to this. This mischaracterizes  
11 the document in evidence.12 THE COURT: I'll allow this question, and then we're  
13 moving on.

14 You may answer the question, if you can.

15 A. But you got to ask it again. I don't --

16 Q. To the extent the descriptions that are contained in  
17 Petitioner's Exhibit 1, the descriptions, reflect only the  
18 payment of a reward and make no mention of subsistence  
19 payments, that document is inaccurate, correct?

20 MR. ALLEE: I renew that objection.

21 THE COURT: Overruled.

22 A. The narrative in this request for the reward is correct.

23 Q. But the initial request was for subsistence payments,  
24 correct? That's what Mr. Melvin wanted?

25 A. The understanding is, yes, yes.

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1 Q. And there's nothing in the description that indicates that,  
2 in fact, there was a subsistence -- this payment was for  
3 subsistence?

4 A. Correct.

5 Q. There's no mention of rent, relocation, hard times, none of  
6 that, correct?

7 MR. ALLEE: Objection.

8 THE COURT: The document speaks for itself,  
9 Mr. Marinaccio. I can read it.

10 MR. MARINACCIO: Thank you, your Honor. You are  
11 correct. It does speak for itself.

12 Q. Now, Agent Boss, by the time Mr. Melvin was testifying at  
13 the trial of Mr. Roth and Mr. St. John, he had already executed  
14 a cooperation agreement, correct?

15 A. Yes.

16 MR. MARINACCIO: I am going to show the witness, with  
17 your permission, what I've marked as Petitioner's Exhibit 2. I  
18 have a copy for the Court as well.

19 THE COURT: Thank you.

20 Q. Do you recognize what has been marked, premarked, as  
21 Petitioner's Exhibit 2?

22 A. No.

23 Q. You don't recognize Petitioner's Exhibit 2 as being the  
24 cooperation agreement?

25 A. I don't know if I've ever seen it.

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1 Q. Were you aware of whether or not, when he testified in the  
2 trial of Mr. Roth and Mr. St. John, that he had a cooperation  
3 agreement in place?

4 A. Yes, he did.

5 Q. But you don't recognize that document as being the  
6 cooperation agreement?

7 A. It could be, but I've never seen it before.

8 Q. Well, take a look at the last page of the document. Do you  
9 recognize the signature of Mr. Melvin?

10 A. Yes.

11 Q. Do you recognize the signature of Mr. Colton?

12 A. Not -- no.

13 MR. ALLEE: Objection, your Honor.

14 THE COURT: Overruled.

15 No?

16 Q. You don't recognize it?

17 A. No.

18 Q. Well, let me ask you this, then. Other than the  
19 cooperation agreement that Mr. Melvin signed with the  
20 government, were you aware of any other agreements that  
21 Mr. Melvin had signed that reflected benefits that he was to  
22 receive in connection with his cooperation?

23 A. No.

24 Q. And do you recall testifying at the trial of Mr. Roth and  
25 Mr. St. John concerning the cooperation agreement that

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Boss - Direct

1 Mr. Melvin had with the government?

2 MR. ALLEE: Objection. Relevance.

3 THE COURT: Overruled.

4 A. You asked me if I remember testifying about his  
5 cooperation?

6 Q. Cooperation agreement.

7 A. I don't remember.

8 MR. MARINACCIO: Your Honor, I'm going to show Agent  
9 Boss what I've premarked as Petitioner's Exhibit 3.

10 Q. Now, directing your attention in particular in Plaintiff's  
11 Exhibit 3 to page 290, line 20 to page 291, line 21. I would  
12 ask you to read that to yourself.

13 A. I'm sorry. What was the end?

14 Q. From 290, line 20 to 291, line 21.

15 A. Okay.

16 Q. It's on several pages the way the computer broke it up.

17 (Pause)

18 A. Okay.

19 Q. Does that refresh your recollection that, during your  
20 direct testimony at the trial, you were asked questions  
21 regarding Mr. Melvin's cooperation agreement with the  
22 government?

23 MR. ALLEE: Objection. Well, your Honor --

24 THE COURT: The question is does it refresh his  
25 recollection.

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Boss - Direct

1                   MR. ALLEE: Your Honor, I will withdraw that  
2 objection.

3                   THE COURT: All right.

4                   Go ahead. Answer the question.

5                   A. Does it refresh my recollection?

6                   Q. Yes.

7                   A. Yes.

8                   Q. Now, you were asked questions about whether or not  
9                   Mr. Melvin, pursuant to his cooperation, had to make any  
10                  recordings in connection with the St. John/Roth matter,  
11                  correct?

12                  A. Whether he had to? Yes.

13                  Q. Whether he had to.

14                  You recall that?

15                  A. Whether he had to make recordings?

16                  Q. Right. Pursuant to his cooperation agreement.

17                  A. Just ask me the question again.

18                  Q. Do you recall being asked questions at the trial about  
19                  whether or not Mr. Melvin had to participate in making phone  
20                  calls in connection with the Roth/St. John investigation in  
21                  November of 2002 in order to satisfy his obligations with the  
22                  government?

23                  A. I don't specifically remember the part about making  
24                  recorded calls.

25                  Q. Well, do you recall testifying that you had advised

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Boss - Direct

1 Mr. Melvin --

2 THE COURT: Don't try to summarize the testimony.

3 Either read the specific question and answer or move on.

4 Q. Do you recall being asked these questions and giving these  
5 answers, beginning on page 290, line 20:6 "Q. Prior to the time that Charles Melvin began making  
7 recordings of David St. John, Malcolm O'Brien and Yolanda  
8 Delgado at your instruction, did you have a conversation with  
9 him with respect to his obligation to do that?

10 "A. Yes.

11 "Q. Okay. What did you tell him?

12 "A. I told him it was up" -- this is at page 291 now, at the  
13 top.

14 A. Got it.

15 Q. Okay.

16 "A. I told him it was up to him if he wanted to continue this  
17 investigation.18 "Q. Did you tell him what effect, if any, that might have on  
19 his chances of getting the benefits of his cooperation  
20 agreement?

21 "A. Yes.

22 "Q. What did you tell him?

23 "A. I told him that he was cooperating, he was doing  
24 everything he was supposed to do, and, by not doing this  
25 investigation, which was up to him, it would not effect the

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Boss - Direct

1 outcome of his cooperation.

2 "Q. Did you promise him that he would already get the 5K  
3 letter?

4 "A. No.

5 "Q. Did you explain to him what his obligations were in order  
6 to earn that?

7 "A. Yes.

8 "Q. What was some of the obligations you explained that he  
9 had?

10 "A. Stay out of trouble, do not get arrested, continue to tell  
11 the truth and provide information."

12 Do you recall being asked those questions and giving  
13 those answers?

14 A. Not specifically.

15 Q. Well, then, let me ask you this. In November of 2002, when  
16 Mr. Melvin was making these recorded conversations, he didn't  
17 have a cooperation agreement, did he?

18 MR. ALLEE: Judge, again, I object to the relevance to  
19 that question and to this line of questions.

20 THE COURT: I'll allow brief inquiry in this  
21 direction.

22 To the best of your knowledge, Mr. Boss, was there any  
23 other cooperation agreement involving Mr. Melvin other than  
24 Petitioner's Exhibit 2?

25 MR. MARINACCIO: Well, Judge, he doesn't recognize 2.

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Boss - Direct

1                   THE COURT: I know he doesn't recognize it. I'm  
2 asking if he's aware of any other cooperation agreement. He  
3 did say he was aware that there was a cooperation agreement.  
4 He couldn't identify that one. My question is if he's aware  
5 whether there were any other cooperation agreements.

6                   THE WITNESS: No.

7                   THE COURT: Go ahead. Put your next question.

8 Q. Are you aware if there was any kind of agreement whatsoever  
9 that reflected what benefits Mr. Melvin might expect to receive  
10 in connection with his cooperation with the ATF, ATF and E?

11 A. I was aware he was eventually signed up with a cooperation  
12 agreement, but I don't know what the timing was, though.

13                   MR. MARINACCIO: Your Honor, I would offer  
14 Petitioner's 3 into evidence. I know it's a part of the Court  
15 record, the trial record, but I would offer that particular  
16 section into evidence.

17                   MR. ALLEE: Judge, I don't object. I'm sure they're  
18 authentic because they're being offered. And any trial  
19 transcripts Mr. Roth seeks to admit for your Honor to consider,  
20 I don't object on any sort of authenticity grounds.

21                   THE COURT: Okay. Petitioner's 3 is received.

22                   MR. ALLEE: Or foundation grounds. He can put them in  
23 with or without this witness is what I'm saying.

24                   THE COURT: I understand. Thank you.

25                   (Petitioner's Exhibit 3 received in evidence)

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Boss - Direct

1 Q. Agent Boss, by the way, in connection with the application  
2 for a reward, Petitioner's Exhibit 1, did you have any  
3 discussion -- other than with Agent McKenna, did you have  
4 discussions with any other agent regarding that reward payment?

5 A. Probably.

6 Q. Do you recall ever having any discussion with -- I guess  
7 he's, today, Lieutenant Campbell of the Newburgh Police  
8 Department?

9 A. Deputy chief.

10 Q. Deputy chief. I'm sorry. I didn't mean to demote him.  
11 Did you have any discussion with him?

12 A. I don't remember, but, most likely, yeah.

13 Q. Do you recall being asked questions on cross-examination  
14 regarding -- cross-examination by Mr. Hochheiser, Mr. Roth's  
15 attorney, regarding the possibility of Mr. Melvin getting a 5K1  
16 letter?

17 MR. ALLEE: Objection.

18 THE COURT: Overruled.

19 MR. ALLEE: Relevance.

20 THE WITNESS: Answer?

21 THE COURT: Yes.

22 A. Again, I don't specifically remember, but it's highly  
23 likely.

24 MR. MARINACCIO: Your Honor, I would like to show the  
25 witness what I've marked as Petitioner's Exhibit 4.

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Boss - Direct

1 Q. And in particular, Agent Boss, I would like to direct your  
2 attention to page 558, line 24 to page 559, line 24.

3 A. Okay.

4 Q. Okay.

5 A. Stop at -- sorry. Stop at line 24 again on 559.

6 Q. On 559.

7 A. Okay.

8 Q. And then let me direct your attention again also to page  
9 560, lines 3 to 5.

10 A. Okay.

11 Q. And page 560, line 12 to page 563, line -- I'm sorry, page  
12 560, line 12 on page 563, lines 10 to 13.

13 A. Just the one line, 12, on 560?

14 Q. I'm sorry. Let me start that over again.

15 Page 560, line 12, and then go to 561, lines 6 to 11.

16 A. 6 through 11? Okay.

17 Q. And page 563, lines 10 to 13.

18 A. Okay.

19 Q. Does that refresh your recollection that, on  
20 cross-examination by Mr. Hochheiser, you were asked questions  
21 concerning the benefit of a 5K1 letter for Mr. Melvin and  
22 whether or not you had discussed that with him?

23 A. Still doesn't refresh my recollection.

24 Q. Okay. Turning now to page 558, line 24. Do you recall  
25 being asked these questions and giving this answer at the

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Boss - Direct

1 trial.

2 A. One second.

3 Q. It's on the unmarked page. It's the continuation of page  
4 558. You got it?

5 A. Yes.

6 Q. Okay.

7 "Q. Now, Mr. Melvin signed a cooperation agreement with the  
8 government; is that right?

9 "A. Yes, he did.

10 "Q. Okay. And that's a cooperation agreement that deals with,  
11 among other things, the subject of this 5K1 letter that we have  
12 been talking about?

13 "A. Yes.

14 "Q. Now, on November 21st, 2002, Mr. Melvin had not signed a  
15 cooperation agreement; is that right?

16 "A. I'm not sure.

17 "Q. Well, he signed it on January 8th, 2003; did he not?

18 "A. I'm not sure.

19 "Q. You don't know whether Mr. Melvin signed a cooperation  
20 agreement on or about November 21st, 2002, at the time of this  
21 conversation with St. John?

22 "A. No; I do not.

23 "Q. Did you discuss with Mr. Melvin his cooperation on  
24 November 21st, 2002?

25 "A. Did I discuss his cooperation on that date? I don't

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Boss - Direct

1 recall.

2 "Q. Did you discuss his cooperation shortly before that date?

3 "A. We did discuss it, yes.

4 "Q. Did you discuss with him the question of benefits that he  
5 might receive?

6 "A. No."

7 Do you recall being asked those questions and giving  
8 those answers?

9 MR. ALLEE: Objection. There's no inconsistency.

10 MR. MARINACCIO: He says he doesn't recall.

11 THE COURT: Overruled.

12 A. No, I don't recall.

13 Q. Okay.

14 Going now to page 560, lines 3 to 5, do you recall  
15 being asked this question and giving this answer:16 "Q. And did you explain to him the procedures -- the concept  
17 concerning the 5K1 letter?

18 "A. No; I did not, no."

19 And then going down to line 8:

20 "Q. Well, then, you testified on direct that when you said to  
21 Mr. Melvin you don't have to, you know, do this for some reason  
22 that you had already done a good deal, something like that,  
23 right? You had already done a lot?

24 "A. He had done enough to earn a letter, yes."

25 Do you recall being asked those questions and giving

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Boss - Direct

1 those answers?

2 MR. ALLEE: I object to this method of questioning.

3 The witness doesn't recall. There's no inconsistency for which  
4 he could read in prior testimony.5 THE COURT: All of the testimony is part of the record  
6 before the Court. Doesn't matter whether he reads it in or  
7 not. It's a part of the record before the Court and may be  
8 considered and may be the subject of argument. So I'm not  
9 quite sure why we're using our time this way, but I'll overrule  
10 the objection.11 MR. MARINACCIO: I'm just looking to highlight those  
12 portions, your Honor, without having to search through a  
13 6,000-page record.14 MR. ALLEE: Just to hone in on my objection, your  
15 Honor, we can argue about the transcript all day, but Mr. Boss  
16 is on the stand now, the Petitioner has called him, and there's  
17 no basis to read to him prior testimony for a purpose other  
18 than to show an inconsistency.

19 THE COURT: I don't disagree with you.

20 Q. Well, let me ask you this, then, Agent Boss. Having read  
21 the sections of the transcript that I've pointed out to you,  
22 they do not refresh your recollection that you were asked at  
23 the trial questions about Mr. Melvin's cooperation and his  
24 eligibility for a 5K letter, correct? Is that your testimony?

25 A. Yes. It doesn't refresh my recollection.

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Boss - Direct

1                   MR. MARINACCIO: Your Honor, I offer Petitioner's 4,  
2 the excerpts, into evidence.

3                   MR. ALLEE: Again, I have no objection to the Court's  
4 receiving the transcript, copies of the transcript.

5                   THE COURT: Okay. Petitioner's 4 is received.

6                   (Petitioner's Exhibit 4 received in evidence)

7                   Q. Do you recall on redirect being asked by Mr. Colton,  
8 following the cross-examination by Mr. Hochheiser, about any  
9 discussions you may have had with Mr. Melvin concerning  
10 Mr. Melvin's cooperation and his eligibility for a 5K letter?

11                  MR. ALLEE: Objection.

12                  THE COURT: Overruled.

13                  A. No.

14                  MR. MARINACCIO: Your Honor, I'm going to show the  
15 witness what we've marked as Petitioner's Exhibit 5 for  
16 identification. We have a copy for the Court as well.

17                  Q. Agent Boss, I would like to direct your attention to page  
18 742, lines 10 through 15 and lines -- well, let's stay with  
19 that so we don't confuse.

20                  A. Okay.

21                  Q. Page 742, lines 10 through 15. Does that refresh your  
22 recollection that you were asked on redirect by Mr. Colton  
23 concerning any discussions you may have had with Mr. Melvin  
24 regarding his obligations?

25                  A. No.

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Boss - Direct

1 Q. And now directing your attention to that same page, but the  
2 continuation, line 23. So that would be page 742, line 23 to  
3 page 743, line 1.

4 A. Okay.

5 Q. Okay. Does that refresh your recollection that you were  
6 asked questions by Mr. Colton on redirect concerning  
7 Mr. Melvin's obligations?

8 A. No.

9 MR. MARINACCIO: Your Honor, I offer Petitioner's 5  
10 into evidence.

11 MR. ALLEE: No objection.

12 THE COURT: Petitioner's 5 is received.

13 (Petitioner's Exhibit 5 received in evidence)

14 Q. Do you recall, Agent Boss, if you were asked any questions  
15 on recross by Mr. Hochheiser concerning Mr. Melvin's  
16 cooperation agreement and what his expectations might be and  
17 what you may have discussed with him about that?

18 MR. ALLEE: Again, I object to all of this on  
19 relevance grounds.

20 THE COURT: I understand the objection. Overruled.

21 A. No, sir.

22 MR. MARINACCIO: Your Honor, I would like to show the  
23 witness what has been marked as Petitioner's Exhibit 6 with a  
24 copy for the Court.

25 Q. I would like to draw your attention to page 770, line 21

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Boss - Direct

1 through page 772, line 18.

2 A. Stop at 17, you said?

3 Q. Page 772, line 18.

4 A. Oh, 18. Okay.

5 Q. Does that refresh your recollection that, on recross by  
6 Mr. Hochheiser, you were asked questions concerning the  
7 cooperation agreement and any discussions you may have had with  
8 Mr. Melvin regarding his expectations of any benefit?

9 A. No.

10 Q. Does it refresh your recollection that the government  
11 stipulated that, in fact, Mr. Melvin signed the cooperation on  
12 January 22nd, 2003?

13 A. Does not.

14 MR. MARINACCIO: Your Honor, I offer what I've marked  
15 as Petitioner's Exhibit 6 into evidence.

16 MR. ALLEE: No objection.

17 THE COURT: Petitioner's 6 is received.

18 (Petitioner's Exhibit 6 received in evidence)

19 Q. Agent Boss, do you recollect whether or not you advised the  
20 jury during your testimony either on direct, cross-examination,  
21 redirect, recross as to whether or not there was any other  
22 agreement with Mr. Melvin regarding his cooperation and what  
23 benefits he might expect to receive if he lived up to his end  
24 of the bargain?

25 A. No.

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Boss - Direct

1 Q. Do you recall discussing in your testimony at the trial any  
2 other benefit that Mr. Melvin might expect to receive other  
3 than a 5K1 letter from the government?

4 A. No.

5 Q. Did you discuss with the jury any other benefit, for  
6 example, in the form of cash payments, whether they be for  
7 reward or subsistence or anything of that nature?

8 A. I don't remember.

9 Q. And you don't remember discussing even the 5K1 letter  
10 benefit that he might receive?

11 A. No.

12 Q. Now, Mr. Melvin himself testified in this trial, correct,  
13 at the trial of Mr. St. John and Mr. Roth?

14 A. He did.

15 Q. And were you present in the courtroom during his testimony?

16 A. Most of it, I believe, yes.

17 Q. And he was called as a witness by the government, correct?

18 A. Yes.

19 Q. And do you recollect as you sit here now that, as part of  
20 his cooperation agreement, he was expected to make himself  
21 available to testify when required by the government?

22 A. That's part of the cooperation agreements, yes.

23 Q. And do you recall as you sit here now that, when Mr. Melvin  
24 took the witness stand in the Roth and St. John matters, he was  
25 testifying pursuant to his obligations under a cooperation

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Boss - Direct

1 agreement?

2 A. That's my understanding, yeah.

3 Q. Were you present during any prep sessions that Mr. Melvin  
4 may have engaged in with the government prior to his actual  
5 testimony?

6 A. Yes.

7 Q. During any of those prep sessions, was the issue of a 5K1  
8 letter under the guidelines discussed with Mr. Melvin?

9 MR. ALLEE: Objection. Relevance.

10 THE COURT: Overruled.

11 You may answer the question.

12 A. Yeah. I'm sure it was several times.

13 Q. And as you sit here now, can you tell us essentially what  
14 was the discussion with Mr. Melvin regarding the 5K letter  
15 during these prep sessions?

16 A. During the prep for the trial?

17 Q. Yes.

18 A. They generally -- I don't remember specifically if they  
19 actually showed it to him and said this is what you're going to  
20 be asked about, the actual 5K letter, cooperation agreement,  
21 or -- no, the 5K. I don't know if they discussed how it's  
22 going to work or -- I don't know the specifics. They  
23 definitely discussed it, though. It's preparation for trial,  
24 yes.

25 Q. And your recollection of what they discussed was the

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Boss - Direct

1 cooperation agreement and a 5K letter, correct?

2 A. Topics, yeah, that would come up during cross or direct,  
3 sure.

4 Q. Was there any discussion regarding any payments that may  
5 have been made to Mr. Melvin and what questions he might expect  
6 in that regard?

7 A. No.

8 Q. Anything about the subsistence payments that are reflected  
9 on the Petitioner's Exhibit 11? 11-A, rather?

10 A. They may have brought that up with him. I'm not sure.

11 Q. Was there any discussion whether he can expect any  
12 questions regarding any reward, cash reward, that he might  
13 ultimately receive?

14 A. No.

15 Q. Do you recall specifically, on direct examination by  
16 Mr. Colton, Mr. Melvin testifying regarding his cooperation  
17 agreement?

18 MR. ALLEE: Objection. There's no relevance  
19 whatsoever of Agent Boss' recollection of the testimony of  
20 other witnesses.

21 THE COURT: Sustained.

22 Q. Well, you were present -- were you present during the  
23 testimony of Mr. Melvin?

24 THE COURT: If you want to make argument --

25 MR. ALLEE: Objection.

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Boss - Direct

1                   THE COURT: -- Mr. Marinaccio, about other things in  
2 the transcript, make argument to me. Don't ask him what  
3 somebody else may or may not have said during the testimony.  
4 We have an official certified transcript. That's what I'm  
5 going to pay attention to, not what this witness might say  
6 about what was or was not asked.

7                   Put your next question.

8                   MR. MARINACCIO: Your Honor, if I may be heard just  
9 briefly on that.

10                  The question comes down to, it seems to me, what this  
11 witness was aware of when he was putting together the  
12 documentation for the reward.

13                  THE COURT: Then ask him that specific question. Were  
14 you aware of X?

15                  MR. MARINACCIO: I thought that's where I was going.  
16 I'll try to rephrase it.

17 Q. Were you aware when you were putting together the  
18 documentation that's reflected in Petitioner's Exhibit number  
19 1, the reward, that Mr. Melvin had been asked questions during  
20 his trial testimony on direct examination, on  
21 cross-examination, and even on recross and redirect regarding  
22 the benefits that he might expect to receive as a result of his  
23 cooperation agreement?

24 A. At the time, I would have certainly been aware.

25 Q. And you were aware, were you not, at the time you were

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Boss - Direct

1 putting together this documentation for the reward,  
2 Petitioner's Exhibit 1, that Mr. Melvin testified that the only  
3 benefit he hoped to get was a 5K letter, which would possibly  
4 result in a reduction of his sentence, correct?

5 A. I don't remember what he testified about to that.

6 Q. You don't remember that?

7 A. To that particular stuff, no.

8 MR. MARINACCIO: Your Honor, I have excerpts of  
9 Mr. Melvin's trial testimony which I would like the Court to  
10 consider specifically on this issue.

11 THE COURT: Fine.

12 MR. MARINACCIO: May I offer them into evidence at  
13 this point?

14 THE COURT: Sure.

15 MR. MARINACCIO: I am offering what has been marked as  
16 Petitioner's Exhibit 7 and Petitioner's Exhibit 8.  
17 Specifically, your Honor, on Petitioner's Exhibit 7, I'm  
18 offering page 801, line 11 to page 806, line 23 and page 804,  
19 line 7 to 9. And on Petitioner's number 8, I am specifically  
20 offering for the Court's consideration page 990, line 3 to page  
21 992, line 24, page 1029, line 5 to line 20, and page 1044, line  
22 15 to line 20.

23 May I hand them up to the Court?

24 THE COURT: Yes, certainly. 7 and 8 are received.

25 (Petitioner's Exhibits 7, 8 received in evidence)

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Boss - Direct

1 Q. Now, Agent Boss, were you present in the courtroom during  
2 the summations and the rebuttal summations that were given to  
3 the jury by Mr. Colton and Ms. Seibel, respectively?

4 MR. ALLEE: Objection. Any line of this inquiry  
5 cannot be relevant.

6 THE COURT: I'm not sure why we're doing it in this  
7 fashion, Mr. Marinaccio. I think it's a tremendous waste of  
8 time. I'll allow you to point me to something. If the  
9 question is were you aware -- I don't get it because this would  
10 have had nothing to do time-wise with what he knew or didn't  
11 know at the time that he put in the application for the reward.  
12 I'm very confused, Mr. Marinaccio. I think you're wasting the  
13 Court's time.

14 MR. MARINACCIO: I apologize if the Court thinks I'm  
15 wasting time. My point is, your Honor, that this witness had  
16 the opportunity between early part of January of 2004, when he  
17 apparently began this process, and the trial's conclusion to  
18 not only bring this to the attention of the government, but  
19 also had various triggers that would have alerted him to make  
20 that information known to the prosecutors, not the least of  
21 which was the fact that he was in court when he heard questions  
22 regarding this benefit pursuant to the cooperation agreement,  
23 and he heard the summations by both Mr. Colton and Ms. Seibel,  
24 which referred to the benefits that Mr. Melvin could have  
25 received. That's the point, Judge. And the point being that

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Boss - Direct

1 my client was prejudiced by the fact that this revelation was  
2 not --

3 THE COURT: Well, that's the argument.

4 MR. MARINACCIO: That's the argument.

5 THE COURT: We're looking for facts now,  
6 Mr. Marinaccio.

7 MR. MARINACCIO: That facts, your Honor --

8 THE COURT: That's what I'm asking you to elicit.

9 And guess what? When you talk and I talk, she only  
10 hears me.

11 MR. MARINACCIO: I understand that, Judge.

12 THE COURT: So there's no point in your trying to talk  
13 over me. It won't do any good.

14 If you want the Court to focus on a specific portion  
15 of the summation and you want to ask the witness whether he was  
16 present, then ask that question.

17 Q. Were you present during the summation of Mr. Colton where  
18 he argued that the benefit that Mr. Melvin could expect to  
19 receive -- and his summation was on February 9th, 2004. Were  
20 you present when Mr. Colton made the argument that the benefit  
21 he would receive was his 5K letter and that he risked that if  
22 he didn't tell the truth?

23 MR. ALLEE: Objection. Compound.

24 THE COURT: Sustained.

25 Were you present during the summations?

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Boss - Direct

1 Q. Were you present during the summations?

2 A. Yes.

3 THE COURT: All right, then, focus my attention on the  
4 specific part of the summation that you want my attention  
5 focused on. He was present. That's all you need to do.

6 MR. MARINACCIO: Your Honor, I would like to offer to  
7 the Court Petitioner's Exhibit 9 specifically referencing page  
8 4700, lines 13 to 22.

9 THE COURT: Petitioner's 9 is received.

10 (Petitioner's Exhibit 9 received in evidence)

11 Q. Agent Boss, were you present during the rebuttal summation  
12 of Ms. Seibel?

13 A. Yes.

14 Q. Do you recall her arguing about the benefit Mr. Melvin  
15 could expect to receive pursuant to the cooperation agreement  
16 and what he risked if he did not tell the truth, specifically  
17 the 5K letter?

18 MR. ALLEE: Objection.

19 THE COURT: He was present.

20 Q. Were you present?

21 A. Yes.

22 MR. MARINACCIO: Your Honor, I would offer what I've  
23 marked as Petitioner's Exhibit 10, specifically page 4970,  
24 lines 18 to 22 to page 4974, line -- oh, sorry -- page 4970,  
25 lines 18 to 22 and page 4974, lines 6 to 11.

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Boss - Direct

1 THE COURT: All right. Petitioner's 10 is received.

2 (Petitioner's Exhibit 10 received in evidence)

3 Q. During the summations of Mr. Colton and Ms. Seibel, did you  
4 ever consider advising them of the application for the reward  
5 that's reflected in Petitioner's number 1?

6 MR. ALLEE: Objection.

7 THE COURT: Overruled.

8 A. Not that I remember.

9 Q. Is there any particular reason why you did not advise them?

10 A. I don't know if I did or didn't.

11 MR. MARINACCIO: May I have a moment, your Honor?

12 THE COURT: Yes, sure.

13 (Pause)

14 Q. Agent Boss, are you familiar with the Attorney General's  
15 guidelines regarding the use of confidential informants?

16 MR. ALLEE: Objection.

17 THE COURT: Overruled.

18 You may answer the question.

19 A. I've heard of them. I mean, familiar as in well versed?

20 MR. MARINACCIO: Your Honor, I'm going to ask the  
21 witness be shown Petitioner's Exhibit 12.

22 Q. Specifically, I want to draw your attention to section  
23 III(b) (8).

24 THE COURT: Is there a page?

25 MR. MARINACCIO: I'm looking for it right now, Judge.

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Boss - Direct

1 Page 19.

2 Q. Are you familiar with that provision -- or were you  
3 familiar with that provision at the time that you were  
4 preparing the application for voucher and reward?

5 A. No.

6 Q. You were not familiar with your obligation to coordinate  
7 with the U.S. Attorney's Office any payments made to a  
8 confidential informant?

9 A. I was aware of that, but this -- referring to this, no.

10 MR. MARINACCIO: Your Honor, I offer Petitioner's 12  
11 in evidence, in particular the section III(b) (8) .

12 MR. ALLEE: I object to this, your Honor. I would  
13 voir dire, but he's the wrong witness. I object to the time  
14 period for this, where Mr. Marinaccio got it, when it was in  
15 effect, the agencies it's provided to. This may be something  
16 we don't need any witnesses for. If he wants to argue about  
17 it, I'm sure we can figure it out, but, so far, I haven't heard  
18 any basis for the time period for this or the use of this being  
19 offered by Petitioner.

20 THE COURT: Well, I see on the last page that it's  
21 dated May 3th, 2002, so I suppose it would have some  
22 application to at least some of the period of time during which  
23 Mr. Melvin was cooperating, which started before May 30th,  
24 2002.

25 I'll receive it. The weight, however, in this context

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Boss - Direct

1 is pretty limited. I don't think the issue before the Court  
2 has anything to do with whether Mr. Boss did or didn't comply  
3 with any guidelines. The only relevance would be whether he  
4 had reason to know that the information should be shared with  
5 members of the prosecution, but whether he did or didn't  
6 comply, that's not an issue before me. I will receive it for  
7 that limited purpose only. And what I've heard so far is less  
8 than convincing. Petitioner's 12 is received for that purpose.

9 (Petitioner's Exhibit 12 received in evidence)

10 Q. Agent Boss, you prepared an affidavit in connection with  
11 these proceedings?

12 A. Yes.

13 Q. And in that affidavit, you explained the circumstances  
14 surrounding the payment of the \$5,000 reward to Mr. Melvin,  
15 correct?

16 A. Yes.

17 Q. I will show you what has been marked as Petitioner's  
18 Exhibit 14.

19 Is that the affidavit?

20 A. Yes.

21 Q. Now, in that affidavit, sir, you speak about, in paragraph  
22 1, the subsistence payments that were made to Melvin, correct?

23 A. Yes.

24 Q. And in the second paragraph, you talk about the \$5,000  
25 payment, correct?

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Boss - Cross

1 A. Yes.

2 Q. And in that second paragraph, there's no mention, is there,  
3 of any request by Mr. Melvin for subsistence assistance?

4 A. No.

5 MR. MARINACCIO: Your Honor, I offer Petitioner's  
6 Exhibit 14.

7 MR. ALLEE: No objection.

8 THE COURT: 14 is received.

9 (Petitioner's Exhibit 14 received in evidence)

10 MR. MARINACCIO: I have no further questions, your  
11 Honor. Thank you.

12 THE COURT: Mr. Allee.

13 MR. ALLEE: Thank you, your Honor.

14 CROSS-EXAMINATION

15 BY MR. ALLEE:

16 Q. Good afternoon, Agent Boss.

17 A. Good afternoon.

18 Q. You testified that you were responsible for essentially  
19 handling Charles Melvin as a cooperator for ATF.

20 A. Yes.

21 Q. Roughly when did you begin working with Melvin as a  
22 cooperator?

23 A. Roughly March of 2002.

24 Q. How did it come about that you began working with him as a  
25 cooperator?

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Boss - Cross

1 A. I received a call from Bruce Campbell -- Donald Campbell  
2 from the City of Newburgh Police Department. They had arrested  
3 Charles Melvin with some guns the night before, and he wanted  
4 to talk.

5 Q. Campbell was an officer in the City of Newburgh?

6 A. He was a detective at the time.

7 Q. Did you thereafter work with Melvin in a cooperating  
8 capacity?

9 A. Yes.

10 Q. Can you describe generally the work that Melvin did.

11 A. Street-level work. We investigated middle-level drug  
12 dealers, purchased crack cocaine, cocaine, a little bit of  
13 heroin, purchased guns with him, all the while wiring him up,  
14 putting on recorders, transmitters.

15 Q. And, just roughly, how many cases did you work with Melvin  
16 where Melvin was cooperating with law enforcement?

17 A. Cases? About five.

18 Q. And again, just approximately, a ballpark, how many  
19 individuals -- withdrawn.

20 How many people who were targets, whether or not they  
21 became criminal defendants, but people who were targets in the  
22 work that you did with Melvin?

23 A. Approximately like 30.

24 Q. Now, prior to testifying in the trial of Donald Roth, the  
25 Petitioner here, Melvin was provided money in connection with

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Boss - Cross

1 his cooperating?

2 A. He was provided subsistence.

3 Q. Who provided Melvin with -- well, withdrawn.

4 When you say subsistence, what do you mean?

5 A. Money to spend on rent, phone, food.

6 Q. And a name for that under the ATF procedures is subsistence  
7 money?

8 A. Yes.

9 Q. That's what that's called?

10 A. Yes.

11 Q. Who provided Melvin with that money? Again, this is prior  
12 to his testifying at the trial.

13 A. Me.

14 Q. And were you responsible for doing that on behalf of ATF?

15 A. Yes.

16 Q. When you say me, you're talking about ATF?

17 A. Mostly just me, but I get the money through ATF. I thought  
18 you meant directly to him.

19 Q. Let me just clarify that for the record.

20 It's the ATF that's providing money to Melvin?

21 A. Yes.

22 Q. And you're the person responsible for doing that at ATF?

23 A. Correct.

24 Q. While he was cooperating, and again, I'm still asking about  
25 prior to the testimony at trial, Melvin was not in custody; is

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Boss - Cross

1 that right?

2 A. He was in custody briefly, for maybe two weeks after his  
3 initial arrest. After that, he was out.4 Q. So at some point -- that's sort of around March of '02,  
5 but, after that, he's working and he's not in custody?

6 A. Correct.

7 Q. Now, at about the time Melvin testified in the trial of  
8 Donald Roth, where was he living?

9 A. Virginia.

10 Q. After Melvin testified in the trial of Roth, did he contact  
11 you?

12 A. Yes.

13 Q. On direct, you described that it was early in the year  
14 2004.

15 A. Yes.

16 Q. This is about roughly a month after Melvin's testimony?

17 A. Correct.

18 Q. Can you describe in substance for the Court your discussion  
19 with Melvin when he contacted you.20 A. He was in rough times. He -- like I said, I don't know if  
21 he got kicked out or couldn't live with his mother anymore. He  
22 had his girlfriend at the time. He had a couple of kids with  
23 her and possibly even a couple of her kids. I remember at  
24 least four kids and her and him. And they needed -- they were  
25 looking for a place to stay, needed help.

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Boss - Cross

1 Q. And did he ask you, in substance, for help?

2 A. Yes.

3 Q. And in substance, how did you respond to him?

4 A. I said I'll see what I can do.

5 Q. How did he contact you? What means?

6 A. Cell phone.

7 Q. At that time, was he still a working cooperator with ATF?

8 A. No.

9 Q. Or with the Federal Government?

10 A. No.

11 Q. He was done?

12 A. Yes.

13 Q. What did you do after you spoke to Melvin to look into how  
14 or whether you could help him?

15 A. That's when I contacted my boss at the time, McKenna.

16 Q. And what did you learn?

17 A. Learned that the only way we could help him out, give him  
18 money, was to give him a reward.

19 Q. And what is a reward?

20 A. It's a payment of money for the work that he had done in  
21 the past.

22 Q. And let me explain. I don't mean reward in the sense we  
23 all use it, but you're referring to an ATF reward, capital R?

24 A. Yes.

25 Q. What is that?

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Boss - Cross

1 A. As I explained, he did a bunch of work for us, did good  
2 work, so we put him in for a reward.

3 Q. And is there a protocol for obtaining and dispensing a  
4 reward under ATF's procedures?

5 A. Yes.

6 Q. What's the protocol in general?

7 A. You fill out that initial form. It's on Plaintiff's  
8 Exhibit 1, the top form, application for public voucher. You  
9 fill out that form. It gets approved by the first-line  
10 supervisor, which, in this case, was John McKenna, and then it  
11 goes up the chain. Supposed to be signed by the division  
12 director, or the SAC, but, in this case, it was signed by the  
13 ASAC, assistant special agent in charge.

14 Q. Here, you followed that protocol in obtaining a reward for  
15 Melvin?

16 A. Yes.

17 Q. And the paperwork that's Plaintiff's Exhibit 1 is part of  
18 what you did to obtain that?

19 A. Yes.

20 Q. You were asked on direct examination about portions of this  
21 document and whether this document, meaning Plaintiff's Exhibit  
22 1, and whether you referred to what Melvin had told you about  
23 Virginia. Do you recall those questions?

24 A. Yes.

25 Q. Now, in the document, on the first page, which is the

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Boss - Cross

1 application of public voucher for reward, there's a  
2 justification for payment section.

3 A. Yes.

4 Q. You see that? And that's kind of the body of the document.

5 A. Yes.

6 Q. All right. That doesn't talk about Virginia or what Melvin  
7 told you about Virginia, right?

8 A. No.

9 Q. But the purpose of that section is about describing,  
10 basically, the assistance that the individual provided, who's  
11 the candidate for the reward?

12 A. Yes.

13 Q. And that's what you described in that section?

14 A. Yes.

15 Q. And even in the first part, where it says justification for  
16 payment, and there's examples, names of persons arrested,  
17 seizures made, those are the types of instances of cooperation  
18 that you would be describing in that section?

19 A. Right.

20 Q. Then later, where there are boxes to check about what the  
21 money's for -- this is page three of Exhibit 1.

22 A. Okay.

23 Q. There's a box to check for informant subsistence. Do you  
24 see that?

25 A. Yes.

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Boss - Cross

1 Q. The box is checked there; is that right?

2 A. Yes.

3 Q. And then on the last page, which is the receipt that you  
4 testified about -- it's page five of the exhibit -- it says  
5 investigative expenses subsistence?

6 A. Yes.

7 Q. You collected subsistence there, right?

8 A. Yes.

9 Q. So there's sort of two things going on in this document; is  
10 that correct?

11 A. Correct.

12 Q. It's describing why the candidate is worthy of the reward.  
13 And that's done in some portions; is that right?

14 A. Yes.

15 Q. And in other portions, there's boxes to check about what  
16 the person is understood or expected to do with the money.  
17 Here, it's subsistence, to subsist?

18 A. Yes.

19 Q. You've testified that the paperwork and everything having  
20 to do with this \$5,000 payment took place after Melvin  
21 testified?

22 A. Yes.

23 Q. At any time prior to or during Melvin's testimony, did you  
24 discuss this payment with Melvin?

25 A. No.

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Boss - Cross

1 Q. And by testimony, I mean his testimony at the trial of  
2 Donald Roth.

3 A. I understand.

4 Q. Did you discuss any payment or any compensation of any kind  
5 to him that would be made in the future prior to or at the time  
6 of his testimony?

7 A. No.

8 Q. Did anybody else in your presence do so?

9 A. No.

10 Q. You described some on direct, but let me ask this. There  
11 were prep sessions for Melvin prior to his testifying?

12 A. Yes.

13 Q. Did you attend those prep sessions?

14 A. Yes.

15 Q. Do you recall now whether you attended all of those  
16 sessions or just some of those sessions?

17 A. Most. Most of those sessions.

18 Q. Most. Maybe all, but you don't know?

19 A. Definitely not all. He was still being prepped while I was  
20 on cross.

21 Q. So you know you weren't at all of them, but you recall that  
22 you were at most of them?

23 A. Yes.

24 Q. All right.

25 Now, returning to the line of questions, in your

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Boss - Cross

1 presence at the prep sessions or really whether it was a prep  
2 session or not, did anybody discuss making a payment to Melvin  
3 in the future, after his testimony in the Roth trial?

4 A. No.

5 Q. Or, again, any kind of compensation?

6 A. No.

7 Q. Do you recall having any discussions with anyone at the  
8 U.S. Attorney's Office, other than in connection with this  
9 habeus petition, about the \$5,000 payment?

10 A. Back then, you're talking about?

11 Q. Yes.

12 Maybe I can rephrase that.

13 Whether it was back then or now, did you discuss  
14 making the payment with AUSA Colton?

15 A. I don't remember if I did.

16 Q. Or then AUSA Seibel?

17 A. Same. I don't remember if I did.

18 Q. Or anyone at the U.S. Attorney's Office who took part in  
19 prosecuting the Donald Roth trial.

20 A. Same.

21 THE COURT: Let me interrupt for a moment.

22 I know that Ms. Pesci's name has been referenced a  
23 number of times in connection with the matter. What was her  
24 connection with the prosecution?

25 MR. ALLEE: Is that for the witness, your Honor?

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Boss - Redirect

1 THE COURT: Yes.

2 THE WITNESS: She was the -- Glenn Colton was a new  
3 assistant at the time when we took the Charles Melvin case. It  
4 was a trigger lock, a 922(g). Terry Pesci was mentoring him,  
5 basically, and then she eventually left the office after -- I  
6 believe after Mr. Roth was arrested, and then Judge Seibel was  
7 put on.

8 THE COURT: All right. So Ms. Pesci's involvement was  
9 well before the trial.

10 THE WITNESS: Prior to trial, right.

11 THE COURT: Okay. Thank you. That's all I needed to  
12 know.

13 Q. In case I left a hole in the questions, let me ask you  
14 this. You've spoken to the government, to the U.S. Attorney's  
15 Office, in connection with this habeus proceeding about this  
16 payment of \$5,000, right?

17 A. Yes.

18 Q. Apart from that, apart from your preparing for today and  
19 the habeus proceeding, did you speak to anyone at the U.S.  
20 Attorney's Office about the payment before?

21 A. Not that I remember.

22 MR. ALLEE: No further questions.

23 THE COURT: Go ahead, Mr. Marinaccio.

24 REDIRECT EXAMINATION

25 BY MR. MARINACCIO:

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Boss - Redirect

1 Q. Agent Boss, in the case of a payment for subsistence and  
2 subsistence alone, would it be necessary, pursuant to the  
3 protocol of the ATF, to prepare the application for public  
4 voucher for reward that is contained in Petitioner's Exhibit 1?

5 A. That's all driven by the -- well, partly driven by the  
6 amount. I can't give -- if a guy's working for me, I can't  
7 give him \$5,000.

8 Q. My question to you is, if you're making a payment that's  
9 strictly to go towards subsistence as opposed to reward, would  
10 the first two pages of Petitioner's Exhibit 1 need to be filled  
11 out?

12 A. Depending on the amount, no.

13 Q. Okay. So you can --

14 A. The amount and the circumstances, I should say.

15 MR. MARINACCIO: Your Honor, I've marked a document as  
16 Petitioner's number 18. I'll make a representation, your  
17 Honor, that I received this document from the government in  
18 connection with discovery. The Bates stamping is the  
19 government's stamping.

20 Q. Agent Boss, do you recognize what is Petitioner's 18?

21 A. Yeah.

22 Q. Okay. This is a request for funds in the amount of \$200,  
23 correct?

24 A. Yes.

25 Q. Okay. And it's basically a request for \$200 to cover

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Boss - Redirect

1 certain expenses; travel, meals, incidentals, correct?

2 A. I don't know.

3 Q. Take a look at page two of the document.

4 A. Oh. Thank you. Yes.

5 Q. Okay. Is this a report that you filled out or prepared?

6 A. I definitely did part of it because the amount in the -- on  
7 the first page, the total funds column, that's my handwriting.  
8 But the last page, where it's written on the bottom special  
9 agent, that's not my handwriting. But the rest of it on that  
10 page is. It's safe to say I had a significant part of  
11 involvement in this, yeah.

12 Q. So in the case of a request for funds for expenses of, say,  
13 \$200, there would be no need to present a document for an  
14 application for public voucher for reward, correct?

15 A. Not for 200, no.

16 Q. Okay. And for other incidental expenses, what we see here  
17 as an example in Petitioner's 18 is the type of paperwork that  
18 would follow such a request, correct?

19 A. Yes.

20 MR. MARINACCIO: Your Honor, I offer Exhibit 18. And  
21 I have no further questions.

22 MR. ALLEE: No objection.

23 THE COURT: Do we know whether this document relates  
24 to Mr. Melvin?

25 THE WITNESS: I can tell you this, your Honor. The

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Boss - Redirect

1 last page, the receipt, has a case number, and I believe that's  
2 the case number I had for Donald Roth, the 765050-03-0017.

3 THE COURT: All right. I can say, based on the  
4 unredacted version of -- is it Petitioner's 1? No,  
5 Petitioner's 11, sorry, that that is, in fact, the same case  
6 number. So, on that understanding, Petitioner's 18 is  
7 received.

8 (Petitioner's Exhibit 18 received in evidence)

9 THE COURT: Do you know, Mr. Boss, if the \$200 that's  
10 referenced here is included in the list of subsistence payments  
11 on Plaintiff's 11-A? Do you know? Do you know?

12 THE WITNESS: I don't.

13 THE COURT: That's fine. Thank you.

14 Mr. Allee, anything else?

15 MR. ALLEE: No, your Honor.

16 THE COURT: Mr. Boss, do you know whether there were  
17 any additional payments made to Mr. Melvin between October 1st,  
18 2003, which is the last date on Plaintiff's 11-A, and February  
19 1st, 2004, which is the date upon which Mr. Melvin signed the  
20 application that's reflected in Petitioner's 1? Do you know if  
21 there were any additional subsistence payments made?

22 THE WITNESS: Between October 1st of '03, you're  
23 asking?

24 THE COURT: Right. And February 1st of '04.

25 THE WITNESS: Yes, there was.

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Boss - Redirect

1                   THE COURT: Do you know how many, how much?

2                   THE WITNESS: I have the -- attached to that is the  
3 government's victim witness forms. I think it's Wendy Olsen  
4 does it in Southern District. There's an EWAP request form.

5                   THE COURT: Oh, is that the 11-B?

6                   THE WITNESS: Yes. It says 5100. He was paid --

7                   THE COURT: But, for example, the document that's  
8 numbered 1 is for a period of time in 2002, and I'm asking in  
9 late --

10                  THE WITNESS: Oh, I'm sorry.

11                  THE COURT: -- in late 2003 into early 2004.

12                  THE WITNESS: I apologize. Correct, no, there is none  
13 that I know of.

14                  THE COURT: Unless, for example, the document that you  
15 were just provided, Petitioner's 18, if that, for example,  
16 reflected the cost of Mr. Melvin's travel in order for him to  
17 testify.

18                  THE WITNESS: It may, but I remember the U.S.  
19 Attorney's Office set up the hotel, travel.

20                  THE COURT: So the payment for his travel would have  
21 been taken care of through the U.S. Attorney's Office, not  
22 through ATF, when it came time for his testimony.

23                  THE WITNESS: He was a witness at that point, so it  
24 was either through Julia Goodwin or Wendy Olsen.

25                  THE COURT: I know that you've said that there were no

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1 discussions with Mr. Melvin about any potential additional  
2 payments, but did you yourself either engage in communication  
3 with him or observe communication by any of the other law  
4 enforcement or prosecutors in this case that might be described  
5 as a wink and a nod or an implication, for instance, saying  
6 something like, no, you can't be assured of any additional  
7 payments, but, at the same time, nodding of heads, what I would  
8 describe as a wink or a nod? Did you ever engage in that with  
9 Mr. Melvin or observe anyone else having that kind of  
10 communication?

11 THE WITNESS: I understand what you're saying, and no.

12 THE COURT: Thank you.

13 All right, any other questions, Mr. Marinaccio, as a  
14 result of my inquiry?

15 MR. MARINACCIO: No, your Honor.

16 THE COURT: Mr. Allee?

17 MR. ALLEE: No, your Honor.

18 THE COURT: Good.

19 Mr. Boss, you're excused.

20 THE WITNESS: Thank you.

21 (Witness excused)

22 THE COURT: We're going to have to take a lunch break.  
23 I don't mind doing a short break, but I don't know what  
24 counsel's preference is. I suspect you're going to need to eat  
25 something.

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1                   MR. ALLEE: I don't need to eat, your Honor. Lunch is  
2 for wimps. I'm ready to go.

3                   THE COURT: I need to eat.

4                   MR. ALLEE: Except for you, your Honor. You're not a  
5 wimp.

6                   THE COURT: I mean, I'm willing to break for a half an  
7 hour, but if counsel wants an hour, we can have an hour.

8                   Mr. Marinaccio? I won't be critical. You want 45  
9 minutes?

10                  MR. MARINACCIO: Yeah. I have to walk across the  
11 street and put a dime in the meter.

12                  THE COURT: Okay.

13                  MR. MARINACCIO: That's it.

14                  THE COURT: Let's reconvene at 1:45. Thank you.

15                  (Luncheon recess)

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Campbell - Direct

## 1 A F T E R N O O N S E S S I O N

2 1:50 p.m.

3 THE COURT: All right, Mr. Marinaccio, you can call  
4 your next witness.

5 MR. MARINACCIO: Call Deputy Chief Campbell.

6 DONALD BRUCE CAMPBELL,

7 called as a witness by the Defendant,

8 having been duly sworn, testified as follows:

9 THE DEPUTY CLERK: Please have a seat and state and  
10 spell your name for the record.11 THE WITNESS: Donald, D-O-N-A-L-D, Bruce, B-R-U-C-E,  
12 Campbell, C-A-M-P-B-E-L-L.

13 THE COURT: You may proceed whenever you're ready.

14 DIRECT EXAMINATION

15 BY MR. MARINACCIO:

16 Q. Mr. Campbell, how are you currently employed?

17 A. I'm employed as the Deputy Chief of Police in the Town of  
18 Newburgh Police Department.

19 Q. How long have you been so employed?

20 A. I've been there for the past year.

21 Q. I'm going to draw your attention to the early part of 2002.

22 What was your law enforcement position then?

23 A. I was a detective in the City of Newburgh Police  
24 Department.

25 Q. And in connection with your role as a detective in the City

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Campbell - Direct

1 of Newburgh Police Department, did you have an occasion to  
2 encounter an individual by the name of Charles Flip Melvin?

3 A. Yes.

4 Q. And when, approximately, was that?

5 A. Sometime in the early part -- early to mid 2002.

6 Q. Did you become familiar with Mr. Melvin through an arrest  
7 that you had made or participated in --

8 A. Yes.

9 Q. -- of Mr. Melvin?

10 A. I didn't participate in the arrest. However, I did  
11 interview him after his arrest on gun charges.

12 Q. Did you have any contact with Mr. Melvin once he became a  
13 confidential informant for the Federal Government?

14 A. Yes.

15 Q. And how frequent was your contact with Mr. Melvin after  
16 that?

17 A. Fairly regular while -- maybe not at first because he was  
18 incarcerated immediately, but once he was released, fairly  
19 regular.

20 Q. When you say regular, was it more than once a week, twice a  
21 week?

22 A. I think it fluctuated different from week to week, but -- I  
23 would have to guess to say any different.

24 Q. Were you working along with the agents from the Bureau of  
25 Tobacco, Firearms and Explosives, ATF --

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Campbell - Direct

1 A. Yes.

2 Q. -- the ATF, in their investigation that involved the use of  
3 Mr. Melvin as an informant?

4 A. Yes.

5 Q. Now, you were situated or stationed up in the Newburgh  
6 area. Is that where Mr. Melvin was living at the time?

7 A. Yes.

8 Q. Now, during the course of your involvement with Mr. Melvin,  
9 did you ever have any opportunity or -- withdrawn -- did you  
10 ever have any occasion to discuss with him his cooperation with  
11 the government and what benefits he might receive as a result  
12 of his cooperation?13 A. I didn't discuss what the government could give him. When  
14 he initially indicated that he wanted to work, he had stated  
15 that he wanted to turn his life around, he was tired of the  
16 drug game, and said he was willing to basically do whatever he  
17 needed to do in order to help himself get out of that  
18 lifestyle.19 Q. And did you forward that information over to the federal  
20 authorities?

21 A. Yes.

22 Q. Did he work for the City or Town of Newburgh separate and  
23 apart from the work he was doing for the ATF?

24 A. Not that I recall.

25 Q. Were you aware of a cooperation agreement that Mr. Melvin

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Campbell - Direct

1 entered into with the United States Attorney's Office for the  
2 Southern District of New York?

3 A. Just that he entered into an agreement. I don't know the  
4 specifics of it.

5 Q. I'm going to show you what we have we've marked for  
6 identification as Petitioner's Exhibit 2 and ask you if you  
7 recognize this document.

8 A. It appears to be a cooperation agreement.

9 THE COURT: Are you familiar with it, sir?

10 THE WITNESS: I don't believe I've ever read this  
11 before.

12 Q. Did you ever see any cooperation agreement that  
13 specifically dealt with the cooperation of Mr. Melvin?

14 A. Not that I recall, no.

15 Q. Did you have any other discussions, other than Mr. Melvin  
16 looking to turn his life around, regarding any benefits that he  
17 might seek or be entitled to as a result of his cooperation?

18 A. No.

19 Q. Did Mr. Melvin, during the term of his cooperation --  
20 withdrawn.

21 Approximately how long did you work with Mr. Melvin  
22 and the ATF in connection with your law enforcement activities?

23 A. I think the initial investigations that we worked with him  
24 were six to eight months, approximately. And I don't think we  
25 did much work with him after that, after the initial arrests

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Campbell - Direct

1 were made where he was, as I say, burned or might be known that  
2 he was utilized after that.

3 Q. Did you have any involvement in the investigation of David  
4 St. John and Mr. Donald Roth?

5 A. Yes.

6 Q. And was it after that particular investigation that you  
7 didn't use Mr. Melvin very much?

8 A. That's correct.

9 Q. Now, during the time that you did use Mr. Melvin, did he  
10 ever request of you any financial assistance?

11 A. Yes.

12 Q. And how frequently did he request financial assistance?

13 A. I couldn't say.

14 Q. Did he indicate what that financial assistance was for?

15 A. To pay his bills and rent.

16 Q. And when those requests were made, what, if anything, did  
17 you do?

18 A. I didn't pay anything to him, but I did meet with Special  
19 Agent Boss, who, at times, gave him money for subsistence, or  
20 if we were to do a drug purchase, he was doing -- buying guns  
21 and drugs for us at the time, and at that time, we would -- he  
22 would give him money.

23 Q. Other than monies that were paid in connection with actual  
24 investigations like buy money and things of that nature, was it  
25 Mr. Melvin that would request monies from you or would you

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1 offer monies to him? How did that work?

2 A. He wouldn't normally ask me for any money unless Agent Boss  
3 wasn't around because he knew we don't have significant funds  
4 to pay informants.

5 Q. During any of your conversations with Mr. Melvin, did he  
6 ever express to you that he expected that the government would  
7 provide him with these subsistence payments in view of the work  
8 that he was doing?

9 MR. ALLEE: Objection. That's vague as to time period  
10 and as to work that he was doing.

11 THE COURT: I think you need to clarify your question,  
12 Mr. Marinaccio. Perhaps you can rephrase it.

13 MR. MARINACCIO: I'll try, Judge, yes.

14 Q. Your initial conversation with Mr. Melvin about him wanting  
15 to change his lifestyle, that led to him becoming a cooperator;  
16 is that correct?

17 A. Yes.

18 Q. That's information that you forwarded over to the federal  
19 authorities, and you began working jointly with them on a  
20 number of cases; is that correct?

21 A. That's correct.

22 Q. How soon after you had this initial encounter with  
23 Mr. Melvin did the topic of monetary compensation for  
24 subsistence come up?

25 A. I don't recall it ever coming up. As a normal course of

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1 business, whenever we do drug buys, we compensate the informant  
2 in some way, but I don't recall any specific conversations that  
3 he requested a specific amount.

4 I think that's the question you're asking.

5 Q. Well, how soon after he began cooperating in the joint  
6 investigation that you were involved in was he advanced the  
7 first payment?

8 A. I don't recall.

9 Q. Well, was it within a matter of weeks, months?

10 MR. ALLEE: Objection. Lacks foundation with this  
11 witness.

12 THE COURT: He said he didn't recall. Put your next  
13 question.

14 Q. Chief Campbell, I'm going to show you what has been marked  
15 as Petitioner's Exhibit 11-A.

16 THE COURT: I already have it.

17 MR. MARINACCIO: I want to show it to the witness.

18 THE COURT: Yes.

19 Q. I ask you if you've ever seen that document.

20 A. I don't recall ever seeing this.

21 Q. Are you aware of how much monies were paid to Mr. Melvin  
22 during the course of his cooperation with the Federal  
23 Government and with your participation in those investigations?

24 A. I met with him frequently as a witness turning over some  
25 monies, but I don't know what the total was.

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1 Q. Now, were you present when a payment of \$5,000 was made to  
2 Mr. Melvin on or about February 21st, 2004?

3 A. I don't specifically recall the actual incident. I do have  
4 a vague recollection of Andy calling me saying -- sorry --  
5 Agent Boss calling me saying I needed to meet up with  
6 Mr. Melvin to give him a payment, but I don't specifically  
7 recall the details or even where we met with him.

8 Q. I'm going to show you what has been marked in evidence as  
9 Petitioner's Exhibit 1 and ask you if you recognize that  
10 document?

11 A. I don't recognize the first several pages, the application  
12 for public voucher for reward. However, the last page is a  
13 typical form that we filled out when paying informants.

14 Q. When you say we, who are you talking about?

15 A. Myself and Special Agent Boss.

16 This is an ATF form, not a City of Newburgh form.

17 Q. And I think you testified that the City of Newburgh or the  
18 Town of Newburgh made no payments to Mr. Melvin; is that  
19 correct?

20 A. Not that I recall.

21 Q. It is possible that additional payments were made other  
22 than payments that were made by the ATF?

23 A. It's possible, but I don't recall any. If he was working a  
24 different case, I don't recall any.

25 Q. Was it the practice of the City of Newburgh to pay

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1 informants who were cooperating with them?

2 A. Yes.

3 Q. Did you at any time discuss that particular practice with  
4 Mr. Melvin?

5 A. I'm sorry. In regards to just what the City of Newburgh --

6 Q. Payment for compensation for work that they were doing for  
7 law enforcement.

8 A. I don't recall.

9 Q. Did you ever have a conversation with Mr. Melvin approached  
10 you and discussed, listen, I want, you know, some payment, you  
11 know, I've been working for you guys, you know, quite  
12 effectively, something like that?

13 A. I believe so. He constantly complained about money, and it  
14 wasn't -- on a fairly regular basis. He was always complaining  
15 about money, how he needed money.

16 Q. And when he asked for money, was there ever an occasion  
17 where, to your knowledge, either you or the ATF said no?

18 A. Oh, yeah.

19 Q. Now, this \$5,000 payment, did you have any involvement --  
20 the \$5,000 payment that's referred to in Petitioner's Exhibit  
21 1, did you have any involvement whatsoever in preparing that  
22 form?

23 A. No.

24 Q. Did you have any discussion with Agent Boss concerning this  
25 particular payment?

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1 A. Not that I recall. I'm sure I had a conversation. I don't  
2 remember the substance of the conversation.

3 Q. Did you ever have a conversation with Agent Boss in which  
4 the payment of a reward to Mr. Melvin was discussed?

5 A. Not that I recall, no.

6 Q. How is it this you came to sign this particular form as a  
7 witness?

8 A. As I recall, and like I say, I only vaguely recall him  
9 calling me and asking me to meet with him. As a normal course  
10 of business, whenever we're giving money to an informant,  
11 whether it be for a drug buy or subsistence, to have somebody  
12 with you as a witness, to sign as a witness, count the money  
13 and make sure it's the proper money and make sure it's going,  
14 obviously, where it's supposed to go.

15 Q. Okay. In this particular case, the \$5,000 was to go to  
16 Mr. Melvin?

17 A. Correct.

18 Q. Did you have any conversation with Mr. Melvin before this  
19 payment was made about this particular payment that's reflected  
20 in Petitioner's Exhibit 1?

21 A. Not that I recall.

22 Q. Did you arrange for Mr. Melvin to be present at the meeting  
23 in which he was provided with the money?

24 A. I just don't remember the circumstances. Like I said, I  
25 don't even remember specifically where we met. It was nine

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1 years ago. And we met with him on multiple occasions, so it's  
2 difficult to select -- figure out which one of those times this  
3 particular payment was.

4 Q. When you say you met with him on several occasions, was  
5 that several occasions in which monies were advanced to him?

6 A. Yeah, monies, drug buys, gun purchases.

7 Q. Again, putting aside the monies that were given in  
8 connection with what I would call drug purchases, gun  
9 purchases, things of that nature, monies for Mr. Melvin's use,  
10 did you have several of those kinds of meetings with  
11 Mr. Melvin, where monies were advanced to him for his use?

12 A. Most of the money that was given to him was at the end of a  
13 deal that had gone down, a successfully completed deal. It  
14 wasn't a normal course of business just to give him money  
15 because he either asked for it or said he needed it. That's  
16 why he was told no frequently. And he complained a lot about  
17 not getting money.

18 Q. Did you discuss with any members of the U.S. Attorney's  
19 Office these cash payments that had been paid to Mr. Melvin  
20 over the course of his cooperation?

21 A. I don't recall any discussions specific to cash payments.

22 Q. Did you have any discussion with Mr. Melvin concerning what  
23 likely benefit he would receive as a result of his cooperation  
24 if it was deemed to be successful?

25 A. I think, at the time that I spoke with him, he was more

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1 concerned with his charges, it wasn't -- not in regards to any  
2 type of monetary advancement or compensation.

3 Q. So, during the period of his cooperation, he had charges  
4 pending against him that he, in effect, was working off as  
5 well; is that correct?

6 A. Yes.

7 Q. And that was in addition to payments that he was receiving?

8 A. Yes.

9 Q. And have you ever seen an agreement between the  
10 government -- and by government, I use that term, you know,  
11 broadly, not only the United States Government, District  
12 Attorney's Office, police department, Town of Newburgh, City of  
13 Newburgh -- have you ever seen any agreement that reflects the  
14 understandings between law enforcement and Mr. Melvin  
15 concerning what benefits he would receive as a result of his  
16 cooperation?

17 A. I don't recall ever seeing any document like that.

18 Q. Do you recall ever seeing any document between any  
19 government entity and Mr. Melvin that reflected that, in  
20 connection with his cooperation, he could expect to receive  
21 monetary payments?

22 A. No.

23 Q. But monetary payments were made as a matter of course over  
24 the period of time of his cooperation?

25 A. Yes.

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1 MR. MARINACCIO: Just give me one moment, your Honor.

2 (Pause)

3 Q. Do you know where Mr. Melvin was living at the time that  
4 the payment of \$5,000 that's reflected in Petitioner's 1 was  
5 made?

6 A. I don't know.

7 MR. MARINACCIO: One moment.

8 (Pause)

9 Q. Do you know if Mr. Melvin was ever sentenced in connection  
10 with the original charges that were brought against him that  
11 led to his cooperation?

12 A. Yes.

13 Q. Do you know when that was?

14 MR. ALLEE: Objection to the relevance.

15 THE COURT: Overruled.

16 Q. Do you know when that was?

17 A. I don't recall the date, no.

18 Q. Do you know if he received a lesser sentence than he might  
19 otherwise have received as a result of his cooperation?

20 A. Yes.

21 Q. And the answer to that is that he did receive a lesser  
22 sentence than he might otherwise have received?

23 A. I believe so, yes.

24 MR. MARINACCIO: Thank you, your Honor. I have  
25 nothing else.

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1 Thank you, Deputy Chief.

2 THE COURT: Thank you.

3 Mr. Allee.

4 MR. ALLEE: No questions, your Honor.

5 THE COURT: Mr. Campbell, did you ever observe any  
6 communication with Mr. Melvin and any law enforcement or  
7 prosecutorial personnel that might have been described as a  
8 wink and a nod, along the lines of, no, you're not going to get  
9 any money, if you understand what I'm saying, where words might  
10 be one thing, but actions might imply something else? Did you  
11 ever observe anything like that?

12 THE WITNESS: No, ma'am.

13 THE COURT: Thank you.

14 Anything else, Mr. Marinaccio?

15 MR. MARINACCIO: Just to follow up.

16 Q. But there were occasions when Mr. Campbell -- sorry, you're  
17 Mr. Campbell -- when Mr. Melvin asked for money where you  
18 either said yes or no?

19 A. Correct.

20 MR. MARINACCIO: Thank you.

21 THE COURT: Mr. Allee, anything else?

22 MR. ALLEE: No.

23 THE COURT: Thank you.

24 You may step down, sir. You're excused.

25 (Witness excused)

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1 THE COURT: Mr. Marinaccio, will we have Mr. Colton?

2 MR. MARINACCIO: We have Mr. Colton.

3 THE COURT: Thank you.

4 Thank you, Mr. Allee.

5 GLENN COLTON,

6 called as a witness by the Defendant,

7 having been duly sworn, testified as follows:

8 THE DEPUTY CLERK: Please be seated and state and  
9 spell your name for the record.

10 THE WITNESS: Glenn Colton. G-L-E-N-N, C-O-L-T-O-N.

11 THE COURT: Go ahead, Mr. Marinaccio.

12 DIRECT EXAMINATION

13 BY MR. MARINACCIO:

14 Q. Good afternoon, Mr. Colton.

15 A. Good afternoon.

16 Q. You and I have never spoken before today, correct?

17 A. That's correct.

18 Q. How are you currently employed, sir?

19 A. I work at a law firm, Dentons U.S., LLP.

20 Q. And how long have you been so employed?

21 A. Well, the firm name has changed a few times, but I've been  
22 with the firm since April of '09.

23 Q. And prior to that, were you with the United States  
24 Attorney's Office in the Southern District of New York?

25 A. There was an intervening firm, but, yes, prior to that, I

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1 was with the U.S. Attorney's Office.

2 Q. And just skipping right back to when you were a U.S.  
3 Attorney, when were you a United States Attorney?

4 A. I was an Assistant United States Attorney.

5 Q. Assistant United States Attorney.

6 A. From 1995 to 2004.

7 Q. And in connection with your duties as an Assistant United  
8 States Attorney, were you involved in the prosecution of David  
9 St. John and Mr. Donald Roth?

10 A. Yes.

11 Q. Were you involved in the investigation into Mr. St. John  
12 and Mr. Roth as it was going on?

13 A. Yes.

14 Q. In connection with your involvement in the investigation,  
15 did you have occasion to meet with and interview a person by  
16 the name of Charles Flip Melvin?

17 A. Yes.

18 Q. And how frequently, in connection with the investigation of  
19 Mr. St. John and Mr. Roth, would you say you met with  
20 Mr. Melvin?

21 A. It's hard to answer the question as asked because  
22 Mr. Melvin was involved in a very substantial number of cases  
23 and investigations that were going on, so to answer it in  
24 connection with just that one case is hard to answer.

25 Q. Okay. Then let me try it this way.

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1                   When did you first become introduced to Mr. Melvin?

2   A. It would have been early in 2002, I believe.

3   Q. And there came a point when Mr. Melvin entered into a  
4   cooperation agreement with the government; is that correct?

5   A. Yes.

6   Q. Mr. Colton, I'm going to show you what has been marked as  
7   Petitioner's Exhibit 2 for identification and ask you if you  
8   recognize that document.

9   A. I don't specifically recall the precise document, but it  
10   does appear to be in the form of what the cooperation agreement  
11   would have been. It has my name on it, but it was signed, I  
12   believe, by Terry Pesci, not by me.

13   Q. Well, could you tell us if this was the cooperation  
14   agreement entered into between the government and Mr. Charles  
15   Melvin?

16   A. Ten years later, I can't tell you this was the precise  
17   agreement, but I have no reason to doubt it is.

18                   MR. MARINACCIO: Your Honor, I offer it into evidence.

19                   MR. ALLEE: No objection, your Honor. We're prepared  
20   to stipulate based on counsel's representation.

21                   THE COURT: I don't mean to put myself in a -- I  
22   definitely don't mean to put myself into a position of a  
23   witness, but I can tell you that the handwriting on the upper  
24   right-hand corner of the first page is my handwriting, and I  
25   can tell you that I was the judge who took Mr. Melvin's guilty

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1       plea at the time that the cooperation agreement was provided to  
2       the Court. I don't have any recollection of it. I can tell  
3       you that only based on recognizing my own handwriting and  
4       checking my records, which show that I did, indeed, preside the  
5       entry of the guilty plea, for whatever that's worth.

6           But based on the government's stipulation, I'll  
7       receive Petitioner's 2.

8           MR. MARINACCIO: Your Honor, just so that the record  
9       is abundantly clear, there is a section of the trial transcript  
10      where the agreement is referred to by the 3500 number, and  
11      there's a stipulation during the trial that this is, indeed,  
12      the cooperation agreement.

13           THE COURT: Well, between that stipulation and this  
14      one, I think we're on solid ground. So Petitioner's 2 is  
15      received, and it's five pages.

16           (Petitioner's Exhibit 2 received in evidence)

17           Q. Now, Mr. Colton, this agreement was entered into between  
18      the government and -- withdrawn.

19           This agreement was apparently signed by Mr. Melvin on  
20      January 22nd, 2003, correct?

21           A. That's the date on the document. I can't tell you I  
22      independently recollect the date.

23           Q. So there was a period of time when Mr. Melvin was  
24      cooperating without the benefit of a cooperation agreement,  
25      correct?

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1 A. There was a time he was providing assistance to law  
2 enforcement under a different agreement than this one.

3 Q. Okay. There was a distinct and separate agreement than the  
4 one that we have here?

5 A. I can't tell you whether it was a written agreement at this  
6 point, this many years later, but the government agreed to  
7 recommend to the magistrate, I believe it was Magistrate Fox at  
8 the time, that Mr. Melvin be released on bail for the express  
9 purpose of aiding law enforcement in investigations.

10 Q. Other than the agreement to have Mr. -- withdrawn.

11 And Mr. Melvin was released soon after his arrest in  
12 order to be allowed to cooperate with the government, correct?

13 A. He was released after his arrest. I don't remember how  
14 much time. My guess is it wasn't that long because you would  
15 lose the efficacy of his ability to be a CI if he's in the  
16 system for a long period of time.

17 Q. And people on the street would know that and perhaps  
18 suspect once he got released, correct?

19 A. That's a fair assumption.

20 Q. Okay. And so, in order to avoid that, you want to move as  
21 quickly as possible?

22 A. Another fair assumption.

23 Q. Okay. Regarding the benefits that Mr. Melvin could expect  
24 to receive as a result of his cooperation, was there any other  
25 agreement between the government and Mr. Melvin other than the

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1 agreement that's reflected in Petitioner's Exhibit 2?

2 A. As of the time he entered into a cooperation agreement as  
3 opposed to an agreement to be released on bail for working on  
4 the street, the only benefits he was to expect were either in  
5 this agreement or any payments, CI payments, made by ATF, which  
6 would have been documented by ATF at the time.

7 Q. And if they were documented by ATF at the time, they would  
8 have also been disclosed to Mr. Roth's attorney during the  
9 course of the trial, correct?

10 A. It would have been my practice and the practice of the  
11 Office to request any information about any benefits, including  
12 payments, aggregate those and include them in the production at  
13 the time the 3500 and Giglio material was produced to the  
14 defense.

15 Q. And it wasn't only your practice, but it's also the policy  
16 of the United States Attorney's Office, isn't it?

17 A. Yes.

18 Q. I'm going to show you what has been marked as Petitioner's  
19 Exhibits 11-A and 11-B.

20 For the record, Mr. Colton, the first to pages of that  
21 document are 11-A and all the remaining pages are 11-B.

22 A. Okay.

23 Q. Do you recognize 11-A?

24 A. I don't specifically remember this document, but it  
25 wouldn't surprise me that we produced a document that listed

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1 the payments. And it would have been our practice to produce a  
2 document or some other proof of the payments so they would be  
3 available to the defense.

4 Q. Well, the number --

5 A. Look, I'll add that I have no reason to doubt that this is  
6 what was produced as 3502-Z and 3502-U.

7 Q. Okay. And the 3502-Z and the 3502-U numbers that appear on  
8 the exhibits, those were the 3500 numbers that were assigned to  
9 the case -- the prosecution of Mr. Roth and Mr. St. John; isn't  
10 that correct?

11 A. It's not exactly accurate. In every case --

12 Q. Correct me.

13 A. In every case that I ever was the AUSA on, we produced 3500  
14 material, and 3501 would have been one witness, 3502 another  
15 witness, et cetera.

16 I presume, based on the document in front of me, that  
17 3502 dash various letters were the materials that were the  
18 Giglio or 3500 material related to Charles Melvin.

19 Q. Okay. Were you aware, Mr. Colton, of any other payments  
20 made to Mr. Melvin -- and I'm talking now during the course of  
21 the trial of Mr. Roth and Mr. St. John. Were you aware of any  
22 other payments made to Mr. Melvin other than those reflected in  
23 Petitioner's Exhibit 11-A?

24 A. I can't tell you, ten years later, that I remember all the  
25 payments. What I can tell you is that it was my practice and

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1 the Office's practice to request the information about any  
2 payments that were made prior to testimony or any promises of  
3 payment made or any other promises of benefits. To the extent  
4 we received information about any promised or actual benefits,  
5 they were turned over to the defense. That's my recollection,  
6 but I can't tell you I remember every single payment.

7 I will tell you that my habit was, if I knew at any  
8 point in time prior to Mr. Melvin finishing his testimony of  
9 any payments or, frankly, any -- if I learned ever that he was  
10 promised something that we didn't disclose, we would have  
11 disclosed it.

12 Q. Well, how about if you had found out that a payment had  
13 been made prior to the conclusion of the trial? Would you have  
14 disclosed that as well?

15 A. In an exercise of caution, I probably would, but I have no  
16 recollection of learning that fact. And I don't know that that  
17 ever happened. I just don't know one way or another.

18 Q. I'm going to show you what has been marked in evidence as  
19 Petitioner's Exhibit 1 in evidence.

20 Do you recognize that document, Mr. Colton?

21 A. I do not.

22 Q. Have you ever seen that document before today?

23 A. I don't have any recollection of seeing this document prior  
24 to you handing it to me.

25 Q. Do you have any present recollection of when the trial in

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1 this matter, meaning the matter of David St. John and Donald  
2 Roth, do you have any recollection now as to when that trial  
3 commenced and when it concluded?

4 A. I can't tell you the exact dates, but I do remember that it  
5 started either late November or early December of 2003 and it  
6 was planned that it would only go a couple of weeks. It ended  
7 up going all the way somewhere around early to mid-February.  
8 But I can't tell you precisely. And of course, there was a  
9 break for the holidays in between.

10 Q. At any time after early January of 2003 to the conclusion  
11 of the trial, were you ever advised by Agent Boss that  
12 paperwork for the payment of a \$5,000 reward for Mr. Melvin had  
13 been begun to be produced?

14 A. Not that I recall.

15 Q. Were you ever told by Mr. Boss at any time before the  
16 conclusion of the trial that the payment of a \$5,000 reward to  
17 Mr. Melvin had been approved?

18 A. Not that I recall.

19 Q. Had you ever been told at any time by Agent Boss that a  
20 \$5,000 reward had actually been paid to Mr. Melvin?

21 A. Not that I recall.

22 Let me just add my answers to your last three  
23 questions are referring to a time period after the time period  
24 in which we produced the list of payments. I didn't study the  
25 list of payments or remember whether there might have been a

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1 5,000 that I did know at the time that was disclosed. I'm  
2 interpreting your question to mean a \$5,000 payment or promise  
3 or paperwork that wasn't disclosed, and the answer is no, I  
4 don't recollect that.

5 Q. Well, had you been advised that a payment of \$5,000 was, to  
6 use the colloquial, in the works as early as January of '03,  
7 would you have disclosed that information to the attorneys for  
8 Mr. Roth and Mr. St. John?

9 MR. ALLEE: Objection. It's compound, it's got the  
10 wrong date, and it calls for a speculative answer.

11 THE COURT: I'll allow it as it stands if the witness  
12 is able to answer.

13 A. I mean, I understand the mistake in the dates, but the  
14 general practice and the cautious practice that we would have  
15 followed, myself and AUSA now the Honorable Cathy Seibel who  
16 tried the case with me, would have been to exercise caution and  
17 disclose either a potential payment or an actual payment or  
18 anything we may have learned about.

19 Q. You recall the examination of -- withdrawn.

20 You conducted the examination of Agent Boss at the  
21 trial of Mr. St. John and Mr. Roth, correct?

22 A. I believe so, yes.

23 Q. I believe you also conducted the examination of Mr. Melvin.

24 A. That's correct.

25 Q. Do you recall questioning Mr. Boss, Agent Boss, regarding

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1 the benefits that Mr. Melvin may have been promised as a result  
2 of his cooperation?

3 A. I don't recall that. I don't dispute it if you have the  
4 transcript. I just don't recall it. It would certainly have  
5 been our practice to bring out in direct of the cooperator the  
6 benefits we knew about, but I don't recall whether that was  
7 also brought out through the case agent, Mr. Boss.

8 Q. Well, how about with the cooperator? Do you recall  
9 eliciting testimony from Mr. Melvin regarding his obligations  
10 pursuant to the cooperation agreement and the government's  
11 obligations pursuant to the cooperation agreement?

12 A. I don't --

13 MR. ALLEE: Objection, your Honor, again, to  
14 recollections of testimony. We have a transcript available to  
15 the Court.

16 THE COURT: I'll allow this question.

17 If you can answer it.

18 A. I don't have a specific recollection of the specific  
19 questions and answers, but it would have been my practice and  
20 the practice of the Office to, on direct examination, bring out  
21 from a cooperator what he expected or she expected, what he or  
22 she was promised, and to go over the cooperation deal, if you  
23 will.

24 Q. To your knowledge, as you sit here today, were there any  
25 promises made to Mr. Melvin in connection with his cooperation

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1 that were not included in his cooperation agreement?

2 A. I will answer it this way. I know of no promises or  
3 benefits or recollect no promises or benefits that weren't  
4 either in the cooperation agreement or otherwise disclosed in  
5 the 3500/Giglio material.

6 MR. MARINACCIO: May I have a moment, Judge?

7 THE COURT: Yes, sure.

8 MR. MARINACCIO: Just let me have one moment, your  
9 Honor.

10 THE COURT: Sure.

11 (Pause)

12 Q. By the way, Agent Boss was present during most of the  
13 testimony in the case of Donald Roth and David St. John,  
14 correct?

15 A. Yes.

16 Q. And they were considered part of the prosecution team?

17 A. When you say they, who are you referring to?

18 Q. I'm sorry. He was considered part of the prosecution team?

19 A. Yes. It was typical to have the case agent be at counsel  
20 table with the government team during a trial.

21 Q. I'm going to show you what has been marked for  
22 identification as Petitioner's Exhibit 13.

23 Have you ever seen that document or a similar document  
24 before?

25 MR. ALLEE: Objection. Relevance.

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1                   THE COURT: Overruled. I'll allow it briefly. I  
2 think that it is arguably relevant, and I'll allow it in the  
3 interest of assuring full and fair opportunity for Petitioner  
4 to pursue the issue that he has raised that is pertinent to  
5 this hearing.

6 A. Can you reask the question, please, or have it read back.

7 Q. Are you familiar with that document?

8 A. I've seen what is colloquially called the Ogden memo, which  
9 was issued years after I left the U.S. Attorney's Office.

10 Q. Was there a similar type of memo in existence when you were  
11 in the U.S. Attorney's Office regarding guidance for  
12 prosecutors regarding discovery?

13 A. I don't recall.

14 Q. Take a look at page six, paragraph seven.

15                   I just ask you if there was -- if you were aware of a  
16 similar direction --

17                   THE COURT: Excuse me, Mr. Marinaccio. The document  
18 is not in evidence.

19                   MR. MARINACCIO: I'm not asking him to read the  
20 document.

21                   THE COURT: Well --

22                   MR. MARINACCIO: I'm just asking if there was a  
23 similar provision in any document that he was familiar with  
24 when he was in the U.S. Attorney's Office.

25                   THE COURT: But how could a reviewing court know what

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Colton - Direct

1 that means since the document is not in evidence? There's  
2 nothing for it to be similar to because it's not in evidence.

3 MR. MARINACCIO: Your Honor, then I would offer  
4 Petitioner's 13 in evidence.

5 MR. ALLEE: That's fine, your Honor. No objection. I  
6 mean, I object on relevance grounds, but --

7 THE COURT: Absolutely, you may, and I'm sustaining  
8 the objection.

9 MR. ALLEE: If he wants to ask the question about the  
10 Ogden memo, he can refer to this document.

11 THE COURT: Seems to me if he wants to ask about the  
12 subject matter that's identified in the paragraph he  
13 referenced, he can ask about the subject matter, but I'm  
14 sustaining an objection to a memo that's dated 2010, after  
15 Mr. Colton left the office and long after this trial was  
16 concluded.

17 Q. In 2003 and 2004, when you tried this case, was there a  
18 policy in the U.S. Attorney's Office that discovery, including  
19 discovery of payments made to a cooperator, was a continuing  
20 obligation on the part of prosecutors?

21 A. I can't tell you --

22 MR. ALLEE: Objection to the form of that question.

23 THE COURT: Overruled.

24 You can answer the question.

25 A. I can't tell you whether there was a written policy from my

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Colton - Cross

1       recollection this many years back, but I will tell you that it  
2       was my understanding and my practice and the practice of the  
3       Office, to my knowledge, to turn over benefits to a government  
4       witness and that, if you learned of benefits after you made the  
5       3500 or Giglio presentation, in an exercise of caution, you  
6       would augment that Giglio or 3500 production.

7       Q. You prepared an affidavit in connection with this petition  
8       by Mr. Roth?

9       A. I assume it was a declaration, but, yes.

10      Q. A declaration.

11           I'm going to show you what has been marked for  
12       identification as Petitioner's Exhibit 16.

13           Is that the declaration you prepared in connection  
14       with this matter?

15      A. It appears to be, yes.

16           MR. MARINACCIO: I offer it into evidence, your Honor.

17           MR. ALLEE: No objection, your Honor.

18           THE COURT: Petitioner's 16 is received.

19           (Petitioner's Exhibit 16 received in evidence)

20           MR. MARINACCIO: I have no further questions.

21           THE COURT: Mr. Allee.

22           MR. ALLEE: Yes, your Honor, briefly.

23       CROSS-EXAMINATION

24       BY MR. ALLEE:

25       Q. Good afternoon, Mr. Colton.

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Colton - Cross

1 A. Good afternoon.

2 Q. You were one of the AUSAs who prosecuted Donald Roth?

3 A. One of the AUSAs who handled the prosecution for the  
4 government of Donald Roth.

5 Q. And there were other AUSAs who participated in the handling  
6 of the prosecution?

7 A. Yes.

8 Q. All right. And you described you were one of the AUSAs who  
9 tried the case.

10 A. That's right.

11 Q. Can you describe your role with respect to the witness  
12 Charles Melvin.

13 A. Myself and then AUSA Cathy Seibel divided the government  
14 witnesses. I was primarily responsible for Mr. Melvin and a  
15 bunch of other witnesses. AUSA Seibel had other witnesses.  
16 And we often worked together in some of the preparation  
17 sessions, strategy issues, et cetera, as to all of the  
18 witnesses.

19 Q. And you ended up doing the direct of Charles Melvin?

20 A. That's correct.

21 Q. Did you prepare, prior to his testifying, with Charles  
22 Melvin?

23 A. I'm sure we did.

24 Q. Generally speaking, what type of preparation did you do?

25 A. I can't tell you I remember the prep sessions, but my

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Colton - Cross

1 practice would have been to meet with the witness, go over the  
2 types of questions that would be asked, give them basic  
3 instructions like tell the truth, listen to the question, think  
4 about your answer and things of that nature.

5 Q. And as Melvin was the witness that you were going to put on  
6 the stand, you were mainly the person handling the preparation  
7 of Melvin in advance of trial?

8 A. I would say with primary responsibility, but, as practice,  
9 what would typically happen is the other AUSA would play the  
10 mock cross, if will you, and ask questions and help in  
11 preparing the witness to understand the questions that he or  
12 she would be asked and make sure that they understand their  
13 obligations, understand the questions that are being asked, and  
14 give accurate answers to the Court.

15 Q. And in those types of preparation sessions with a witness,  
16 and, here, a cooperating witness, is it just yourself, the AUSA  
17 and the witness, or were there ordinarily others present?

18 A. It was my practice and the practice of the Office not to  
19 meet with witnesses without a nonlawyer present, typically a  
20 law enforcement officer. So, in the case of Melvin, it would  
21 have been Agent Boss, Detective Campbell or potentially one of  
22 the Office's investigators if neither Agent Boss nor Detective  
23 Campbell were available.

24 Q. During the prep sessions, do you recall discussion of any  
25 kind -- the prep sessions with Melvin, do you recall discussion

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Colton - Cross

1 of any kind that you took part in or that you heard about  
2 making a future payment to Melvin after he testified?

3 A. I have no recollection of that.

4 Q. And do you recall -- my first question was about whether  
5 you recalled discussion of any kind. Do you recall implication  
6 of any kind, whether or not it was discussed, any implication  
7 in any way that Melvin would be given money in the future,  
8 following his testimony?

9 A. No.

10 Q. The other limitation on my question, which I'll elaborate  
11 on, forget money, just any kind of compensation in any form in  
12 the future, any promise of any benefit following his testimony,  
13 do you recall discussion of that with Melvin in the prep  
14 sessions leading up to his testimony at the trial of Donald  
15 Roth?

16 A. When you say any benefit, I'm sure we discussed the  
17 possibility, if he met all of his obligations under the plea  
18 agreement, to get a 5K letter from the government at the  
19 sentencing phase.

20 Q. And you recall, in the prep sessions, discussion of what we  
21 refer to as a 5K?

22 A. I don't tell you I remember those discussions, but I'm sure  
23 we had them.

24 Q. All right. And why do you say you're sure that you had  
25 them?

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Colton - Cross

1 A. Because it was our pattern and our practice with every  
2 cooperator to review, again, in preparation and then actually  
3 during direct examination the plea agreement and the benefits  
4 and obligations for both the cooperator and the government.

5 Q. And it was your practice, in preparing a witness in  
6 Melvin's position, to talk about -- preparing him to testify  
7 about the 5K -- the potential of a 5K letter?

8 A. Yes.

9 Q. After Melvin testified at the trial of Donald Roth, do you  
10 recall any discussion with Agent Boss about a payment made to  
11 Melvin after his testimony?

12 A. I do not recall any discussion like that.

13 Q. And now not to limit the question to Agent Boss, with  
14 anyone from ATF or law enforcement about making a payment to  
15 Melvin after his testimony. Do you recall any such discussion?

16 A. I do not recall any such discussion.

17 Q. And the allegation of such a payment came to your attention  
18 in connection with this habeus proceeding?

19 A. I learned from either you or an ATF supervisor that there  
20 was such an allegation being made. I don't know, frankly, if a  
21 payment was ever made or not.

22 MR. MARINACCIO: No further questions.

23 THE COURT: Mr. Marinaccio.

24 MR. MARINACCIO: No questions.

25 THE COURT: Mr. Colton, in addition to the list of

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Colton - Cross

1 subsistence payments that were incorporated in 3500 material  
2 that came from ATF apparently during the course of Mr. Melvin's  
3 cooperation, would it also be fair to say that there would have  
4 been some payments that would have had to be made in order for  
5 Mr. Melvin to be present and testify; that is to say travel  
6 expenses, hotel, food, that sort of thing?

7 THE WITNESS: It's possible. I can't recall, your  
8 Honor, whether he was living in the area, whether he was  
9 working. I don't recall. I have a vague recollection that he  
10 was working in some type of job at that time, but I won't swear  
11 to it under oath because my recollection is not good enough.  
12 But it's possible, but possibly not, that such payments would  
13 have needed to be made.

14 THE COURT: Well, assuming for the moment that there's  
15 been testimony that he was living in Virginia at the time of  
16 his testimony. Would I be correct in saying that it would have  
17 been the U.S. Attorney's Office that would have arranged for  
18 his travel rather than the ATF, that that would have been the  
19 normal course with regard to a witness who was being called  
20 upon to testify?

21 THE WITNESS: Yes. The normal course of practice,  
22 through Wendy Olsen's office, the victim witness coordinator  
23 would have coordinated travel and the logistics.

24 THE COURT: And so my question is -- and I know you  
25 don't have any specific recollection about how Mr. Melvin's

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Colton - Cross

1 circumstance was handled, but my question is, in the ordinary  
2 course of the procedures that you followed, would there have  
3 been any additional information provided to defense counsel in  
4 the criminal case about those additional travel payments or  
5 would that have just been inferred, that they would be  
6 recognizing that that had to have been made?

7 THE WITNESS: I don't have a specific recollection,  
8 but I -- sitting here today, I would guess that there was a  
9 difference between repaying an out-of-pocket expense versus  
10 giving a benefit like cash which somebody could use for  
11 whatever they chose to use it for.

12 THE COURT: All right.

13 With regard to your conversations with Mr. Melvin  
14 during the investigation and prosecution of the case, and  
15 particularly prior to and during his testimony, were there any  
16 occasions when now Judge Seibel had worked with Mr. Melvin, but  
17 you were not present?

18 THE WITNESS: I don't recall that, but it's certainly  
19 possible.

20 THE COURT: All right. Thank you.

21 Anything else, Mr. Allee?

22 MR. ALLEE: No, your Honor.

23 THE COURT: Mr. Marinaccio?

24 MR. MARINACCIO: No, your Honor. Thank you.

25 THE COURT: Thank you.

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1                   You may step down, sir.

2                   THE WITNESS: Thank you, your Honor.

3                   THE COURT: You're excused.

4                   (Witness excused)

5                   THE COURT: Mr. Marinaccio, what's your pleasure?

6                   MR. MARINACCIO: Your Honor, the additional witness  
7                   that I would have liked to call is Mr. Melvin. I've indicated  
8                   on the record already that, in my conversation with his  
9                   counsel, his counsel has indicated that he intends to have  
10                  Mr. Melvin invoke his Fifth Amendment privilege. His attorney  
11                  is not available and won't be available until next week  
12                  sometime. It is my position that, given the nature of these  
13                  proceedings, the examination of Mr. Melvin can be conducted  
14                  without him incriminating himself in any way.

15                  THE COURT: Well, Mr. Marinaccio, the difficulty that  
16                  I have with that is that, despite any limitation on the subject  
17                  matter of direct examination of Mr. Melvin, in addition to the  
18                  scope of the direct examination, Respondent's counsel would be  
19                  entitled to inquire into issues relating to the witness'  
20                  credibility, and if Respondent's counsel were hampered in that  
21                  effort, then Respondent's counsel would be entitled to seek to  
22                  strike the testimony, and I think it's reasonable to assume  
23                  that that would include inquiry about currently pending charges  
24                  against Mr. Melvin for which he clearly would have a Fifth  
25                  Amendment right.

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1                   So it seems to me an exercise in futility to make  
2 further efforts along those lines, although I could, of course,  
3 inquire of Mr. Allee whether he would intend to limit his  
4 examination simply to what occurred in this case or whether he  
5 would be seeking to make further inquiry into other matters  
6 relating to Mr. Melvin's credibility.

7                   MR. ALLEE: Mr. Melvin's credibility would be at  
8 issue. We would ask questions that go to his credibility,  
9 which includes conduct more recent than the -- conduct that is  
10 recent and that is directly part of what he's now being  
11 prosecuted for.

12                  But I would add there are lots of reasons that I can  
13 imagine Mr. Melvin and Mr. Vita, on Mr. Melvin's behalf, would  
14 want to invoke the Fifth Amendment that are not even about  
15 directly his pending charges or even about his credibility. I  
16 mean, even for him to admit he was a cooperator or that he --  
17 or if asked questions about whether he was paid and whether  
18 that payment was disclosed, that might be something that could  
19 be a link in a chain that the government would want to offer  
20 against him in the criminal case. So it seems to me there's a  
21 good basis, a substantial basis, for the invocation of the  
22 Fifth Amendment on both the direct testimony that  
23 Mr. Marinaccio would ask and certainly on our cross on the  
24 events of this case and our cross of other matters about his  
25 credibility.

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1                   THE COURT: And is it fair to assume, Mr. Allee, that  
2 your office is not interested in granting Mr. Melvin immunity?

3                   MR. ALLEE: Yes, your Honor. We are prosecuting  
4 Mr. Melvin now. And he's indicted. He actually has a trial.  
5 I understand there's a trial scheduled for Mr. Melvin later  
6 this month. And, yes, your Honor, to answer your question, we  
7 have no intention to immunize him in this matter.

8                   THE COURT: I'm inclined, Mr. Marinaccio, to move  
9 forward without further pursuing the matter. I, of course, am  
10 very familiar with Mr. Vita. I trust his judgment. I  
11 certainly trust that you are fairly and accurately reporting  
12 what he has said to you. I have no reason to doubt that. And  
13 I think, rather than further telescoping the process, I'm  
14 inclined to sustain Mr. Melvin's right to invoke his Fifth  
15 Amendment privilege and not to go through an exercise in  
16 futility by having him attend simply to invoke that privilege.

17                  As I said, I don't think that it's appropriate where  
18 credibility is the crucial issue for me to make some type of  
19 effort to hamstring the U.S. Attorney's Office in their  
20 examination of Mr. Melvin, and that would be the only prospect  
21 under which he could be expected to testify, though, frankly,  
22 if I were Mr. Vita, I still wouldn't let him testify even with  
23 a limited scope.

24                  MR. MARINACCIO: Your Honor, I think that this  
25 highlights the prejudice that Mr. Roth is suffering as a result

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1 of the failure of the agents to promptly notify the government,  
2 if that, indeed, is what ultimately is the Court's finding,  
3 about this reward payment, because, clearly, in 2004, we would  
4 not have been faced with this issue. We're faced with this  
5 issue now because a cooperator has strayed back onto the bad  
6 path that he had been walking prior to his cooperation  
7 agreement, and now he becomes a witness who is unavailable to  
8 Mr. Roth through no fault of Mr. Roth's, and, frankly, he's a  
9 witness who can best shed light on, in a non-circumstantial  
10 way, what his expectations were as he was proceeding here down  
11 this course of cooperation. We've gotten a little glimpse,  
12 through Agent Boss and through Deputy Chief Campbell, but  
13 clearly the best evidence of what his expectations were, what  
14 his desires were and what he believed the government was  
15 prepared to do for him comes from him.

16 I think that, Judge, given the narrow issue, I think  
17 the Court can restrict cross-examination under its general  
18 powers to restrict cross-examination. There's certainly enough  
19 material in the record as it stands, in the trial record, to  
20 call into question Mr. Melvin's credibility on a slew of other  
21 issues, including his prior bad acts, that it would certainly  
22 be gilding the lily to go into any further collateral matters  
23 when you have a witness who is crucial on this issue of what  
24 was his expectation, what was his mind-set, and what he had  
25 requested in connection with the ultimate payment of the

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1 reward, you know, to him.

2 So I would ask the Court to reconsider or at least  
3 give me the opportunity to present further argument at a time  
4 when Mr. Vita is available to state his position. But,  
5 frankly, Judge, I'm an officer of the Court. I've stated it as  
6 accurately as I can. I think the issue comes down to whether  
7 or not it's a legitimate exercise of his Fifth Amendment  
8 privilege and whether or not there is a way, short of immunity,  
9 which I don't expect the government to award him, that we can  
10 go with in order to get his vital testimony.

11 THE COURT: Mr. Allee.

12 MR. ALLEE: Well, the government's position is your  
13 Honor has already ruled correctly that this is a proper  
14 invocation of Fifth Amendment.

15 Mr. Vita, by the way, what Mr. Marinaccio is saying  
16 about his availability, he's just out of the country this week,  
17 but he's been very responsive. I've asked him what  
18 Mr. Melvin's position is, and I know Mr. Marinaccio has.  
19 Mr. Vita returns next week if the Court wants to hear from him.  
20 But that's a proper invocation of the right.

21 To put it in context, I disagree with Mr. Marinaccio.  
22 This is not some habeus petition and this hearing is not some  
23 abstract inquiry into what were the raw thoughts or emotions or  
24 expectations in Melvin's head. This is about a specific  
25 instance of a payment of \$5,000 to Melvin after he testified,

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1 which arguably, at best, gives an implication or prompts some  
2 further inquiry into whether there was an expectation of this  
3 payment beforehand or whether that expectation was created from  
4 a promise, whether there was a basis for it from the  
5 government. You heard from the handling agent. You heard from  
6 the handling AUSA, testimony from them. They already put in  
7 affidavits. They were credible witnesses. There's no evidence  
8 to the contrary that this is a payment that came -- that was  
9 not even in anybody's mind's eye until after Melvin testified.  
10 It is, therefore, definitionally, not impeachment. And that  
11 not only is what they testified to, that makes a whole lot of  
12 sense. For example, \$11,000 in payments were made to Melvin  
13 before he testified, and that was all disclosed. There was all  
14 kinds of other impeachment of Melvin. He's committed all kinds  
15 of crimes prior to his testimony. That was all disclosed. He  
16 was crossed on that. He was directed on that.

17 THE COURT: Do I recall that there was no cross about  
18 the \$11,000 in payments?

19 MR. ALLEE: Yes, your Honor, which is something I  
20 emphasized slightly in our brief to point out the immateriality  
21 of this. The defense had \$11,000 in payments to someone now  
22 Mr. Marinaccio would try to describe as a star witness,  
23 Mr. Roth would, and they didn't even bother to cross on that.  
24 They had so much other cross, they didn't even bother with the  
25 \$11,000 in payments that were made. So the baseless assertion,

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1 the unproved assertion, that there was some promise of more  
2 money to Melvin and to keep it quiet until after he testified,  
3 there will be a reward, just doesn't square with common sense  
4 under the circumstances.

5 There's another reason why it doesn't square with the  
6 circumstances, which is Melvin was a key person in this  
7 investigation. There's no dispute about that. He's the person  
8 who was at the center of the charged allegations, the witness  
9 that was allegedly attempted -- that was the subject of the  
10 attempt at tampering. However, his testimony was not real  
11 vital. There's a couple easy ways to explain how that is. The  
12 first is it was recorded. What he did was recorded. There was  
13 a head bob that wasn't recorded that he testified about, but  
14 that's about it. It occupied very little of the summation  
15 proportionately, discussion of his testimony, and even very  
16 little of the transcript of the trial, at least the direct.

17 And don't take my word for it, Judge. Judge Robinson,  
18 at our post-trial motion where Melvin was challenged on other  
19 grounds, there was a Rule 33 motion that arose while the appeal  
20 was pending, and Judge Robinson then addressed the claimed  
21 error, the claimed problem, and then went on to sort of  
22 prejudice analysis and pointed out -- summarized basically what  
23 I'm -- I'm re-summarizing what Judge Robinson said in response  
24 to that motion, that Melvin was not the star witness he was  
25 made out to be by Mr. Roth.

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1                   So, for those reasons, my first point is Mr. Vita's  
2 telling me that his client would invoke the Fifth Amendment. I  
3 have every reason to believe that that's in good faith and  
4 there's a basis for his doing that. And second, we don't need  
5 to hear from Mr. Melvin. There are ten reasons why the habeus  
6 petition -- why the Petitioner has not met his burden and why  
7 it should be denied.

8                   MR. MARINACCIO: Your Honor, if I just may briefly  
9 respond.

10                  There are a number of strategic reasons why the  
11 attorneys for Mr. Roth and Mr. St. John would not have gone  
12 into subsistence payments, not the least of which it may have  
13 raised the specter of, you know, a witness who had to be  
14 relocated, threats, things of that nature, and so,  
15 strategically, I can see why that would not be gone into in  
16 view of the other materials, as well, that they had to go into.

17                  But this is something different, your Honor. This is  
18 a reward. And the context of this reward has to be viewed in  
19 the context of the questioning of the witnesses and the  
20 arguments made by the prosecution and the impression that was  
21 left in the minds of this jury, and that is that the only  
22 benefit -- the only benefit that Mr. Melvin could expect to  
23 receive were the benefits that were outlined in the cooperation  
24 agreement, to wit, the 5K letter. It is said over and over and  
25 over and over again.

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1                   Now, we've heard today from Deputy Chief Campbell that  
2 Mr. Melvin was constantly asking for money and that it was  
3 their practice to reward an informant whenever there was a  
4 successful investigation or investigative technique, whether it  
5 be a purchase of drugs or a purchase of guns or whatever, and  
6 that he was constantly asking for money. So it really begs the  
7 question as to what Mr. Melvin really thought he was going to  
8 get over and above the cooperation agreement and whether or not  
9 that information should have been made available to the  
10 defense, who would have then been able to decide for themselves  
11 whether or not, as a strategic matter, that was something that  
12 should be put before the jury. And again, we can only find  
13 that out through -- because I can't go into -- no one in this  
14 room can go into the mind of Mr. Melvin. This is Mr. Melvin,  
15 crucial testimony from him.

16                   Short of that, your Honor, the other issue that we  
17 have is the issue of Judge Seibel.

18                   I would also request that, regardless of what the  
19 Court's ruling is on Mr. Melvin or Judge Seibel, that I be  
20 allowed to order the minutes of this hearing and be given a  
21 period of time, at least 30 days, to make a written submission  
22 to the Court.

23                   THE COURT: Well, I want to point out, in carefully  
24 reviewing Petitioner's Exhibit 1, and specifically the first  
25 two pages, the application and public voucher for reward, I

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1 think it's important to recognize that, whether or not the  
2 application for reward was listed under the St. John and Roth  
3 case number, the substance of the section that says  
4 justification for payment identifies on the second page the  
5 successful prosecution of 13 defendants to date, and, as I read  
6 this, that does not include Mr. St. John, et al., and Mr. Roth.  
7 In fact, in the more lengthy paragraph under justification for  
8 payment, it refers to 11 defendants who pled guilty or were  
9 found guilty at trial. So that's the first 11 apparently in a  
10 single case involving cocaine apparently having been completed  
11 to its final end before the form was completed. Then in the  
12 next paragraph, another separate person who, according to the  
13 last line, had, by that date, already pled guilty. Then in the  
14 next paragraph, a reference to yet another defendant who was  
15 found guilty. So my reading is those are the 13 defendants  
16 that are referenced in the second-to-last paragraph on the  
17 second page.

18 And in addition to that, on the bottom paragraph of  
19 the justification for payment on the first page, there's a  
20 reference to a case that had not yet resulted in a plea and  
21 then at the top of the second page, the then ongoing trial  
22 involving Mr. St. John and Mr. Roth. And while it's clear that  
23 Mr. Melvin's testimony in that case was a part of the  
24 justification for the reward, in my view, it is, at best, a  
25 modest part of the entire justification. And that's true even

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1 though the application was apparently put in under that case  
2 number.

3 So, yes, there was a reward. Yes, in my view, the  
4 information should have been produced since the agreement to  
5 make the payment apparently was reached prior to the conclusion  
6 of the trial. But it is a de minimus part of the justification  
7 for the reward, and I have a hard time trying to conclude that  
8 it could possibly have made any difference to the results of  
9 the trial in St. John and Roth.

10 Mr. Allee, would you like to address for a moment the  
11 government's current position with regard to Petitioner's  
12 application to examine Judge Seibel in this connection?

13 MR. ALLEE: Well, your Honor, obviously, she's a  
14 judge, but, regardless of whether she's a judge, it just seems  
15 there's no basis to call witnesses who have no personal  
16 knowledge here, and she fits in that category. The testimony  
17 from Mr. Colton was consistent with what I understood in  
18 looking into this matter, which is it was Mr. Colton who put on  
19 Melvin as a witness. Mr. Colton described and I think we all  
20 understand --

21 MR. MARINACCIO: Your Honor, maybe I can cut this  
22 short. We will withdraw the subpoena for Judge Seibel and deal  
23 with the testimony of Mr. Colton.

24 THE COURT: Okay. Thank you. That resolves that  
25 issue.

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1 MR. ALLEE: Must be my powerful persuasive argument.

2 THE COURT: Well done, Mr. Allee.

3 MR. MARINACCIO: That as well, that as well,

4 Mr. Allee.

5 THE COURT: All right. I am concluding that  
6 Mr. Melvin has a valid Fifth Amendment right to decline to  
7 testify. I am concluding that Mr. Vita has properly interposed  
8 that objection to Mr. Melvin being called as a witness.

9 I will certainly grant you the opportunity,  
10 Mr. Marinaccio, to order the transcript and to provide a  
11 written submission on any of the issues raised in the matter.

12 Thirty days takes us to a weekend, so it would be June  
13 10th, the Monday.

14 MR. MARINACCIO: Will we be able to get the  
15 transcript? Okay. Let me make sure that somebody doesn't have  
16 my -- your Honor, I don't want to hit this one too hard.  
17 There's a possibility I'll be out of commission for a week  
18 beginning Monday for a personal medical issue.

19 THE COURT: I'm sorry. This coming Monday?

20 MR. MARINACCIO: Yes, yes, this coming Monday. So can  
21 we make it either the 18th or the 24th of June as opposed to  
22 the 10th?

23 THE COURT: Any objection, Mr. Allee?

24 MR. ALLEE: Absolutely no objection.

25 The first two weeks of July, I'm on leave, and so if

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1 it's the 18th, I can probably get it in before then no problem.  
2 If it's the 24th, it might be tight, depending on what the  
3 submission is. I would ask it be either the 18th or have time  
4 in July after I return.

5 THE COURT: Tell you what. Why don't we make it the  
6 24th and then, Mr. Allee, give you 'till the 29th of July.

7 MR. ALLEE: Yes, your Honor. Thank you.

8 THE COURT: Is that all right?

9 MR. ALLEE: Thank you.

10 MR. MARINACCIO: So 6-24 for Petitioner's submission.

11 THE COURT: Yes.

12 MR. MARINACCIO: 7-29 for any reply.

13 THE COURT: Well, for the opposition. Your reply then  
14 August 9th. Is that all right?

15 MR. MARINACCIO: 8-9 for reply.

16 THE COURT: Yes.

17 MR. MARINACCIO: Fine.

18 THE COURT: Let's schedule -- can we plan to come  
19 back, then, how's Friday, September 13th? Friday the 13th?  
20 It's an auspicious day. At 10 a.m.

21 MR. MARINACCIO: Friday the 13th at 10 a.m.

22 THE COURT: All right. Thank you very much. We are  
23 adjourned.

24 MR. MARINACCIO: Thank you.

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